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Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE DON SUNDQUIST, PETITIONER

*v.*

WAYNE CHASTAIN, RESPONDENT

***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

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## QUESTION PRESENTED

Does the doctrine of official immunity, which provides public officials acting within the sphere of their official duties with certain protections from civil actions seeking monetary damages, apply to a Member of Congress who is engaged in the performance of official, though not legislative, duties?

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# In the Supreme Court of the United States

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WAYNE CHASTAIN, RESPONDENT

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

Petitioner, the United States Representative for the Seventh District of Tennessee, through the General Counsel to the Clerk of the United States House of Representatives, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on November 6, 1987 in this proceeding.

## OPINIONS BELOW

The opinion of the court of appeals will be reported at 833 F.2d 311 (D.C. Cir. 1987), and is attached as Appendix A. The opinion of the district court was not published, and is attached as Appendix B.

## JURISDICTION

The judgment of the court of appeals was entered on November 6, 1987. That Court denied a petition for rehearing with a suggestion for rehearing *en banc* by a vote of six in favor to five against, one judge not participating, on January 27, 1988; the order is attached as Appendix C. Rehearing *en banc* would have required the vote of a majority of the twelve judges, one more than the six who voted for it. This petition was filed within 90 days of that

date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 1, provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

## STATEMENT OF THE CASE

1. The Honorable Don Sundquist has served as the United States Representative for the Seventh District of Tennessee since 1983. That district consists in large part of the suburbs of Memphis, and issues of public interest in the Memphis area naturally occupy much of Congressman Sundquist's attention. Taking all allegations in Plaintiff's Complaint (attached as Appendix D) and Exhibits (excerpts from which are attached as Appendix E) as true, it appears that a major public controversy has developed in Memphis between the Memphis Area Legal Services (MALS) and the Memphis bench, specifically the Juvenile Court of Memphis and Shelby County. The Juvenile Court supervises child support payments by parents. MALS contends that the Juvenile Court follows improper procedures. The dispute has led to statements and counter-statements by public officials, charges in the media, and a number of lawsuits other than this one. Complaint ¶¶ 4 and 6, Appendix D at 60a–61a; App. E at 70a (news coverage).

"On January 14, 1985, [Congressman Sundquist] wrote a letter (Exhibit A [to the Complaint]) on his official letterhead stationery to William French Smith, then Attorney General of the United States." Complaint ¶ 6, App. D at 61a. That letter stated the Congressman's "major concern" that MALS "may actually be involved in the obstruction of the administration of the Child Support En-

forcement laws." *Id.*[1] Congressman Sundquist's letter concluded that because of the "many alleged irregularities" and "the possibility of the obstruction" of the law, that he "would urge" that the Attorney General conduct "whatever . . . investigation [he] deem[s] appropriate." *Id.*, App. E at 69a. Plaintiff Chastain has subsequently conceded that Representative Sundquist's letter was "within his function as a Congressman," App. B at 53a.

Plaintiff responded with a letter of his own to the Attorney General saying that he was "really indebted to [Congressman Sundquist] for bringing our problems to your attention" and expressing the hope that "[p]erhaps Rep. Sundquist's request for your office to investigate Legal Services will serve as catalyst for your department to step in and investigate complaints from all sides." App. E at 71a.[2] That letter from the Plaintiff repeated his own charges about the Memphis judiciary.[3] The Justice

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[1] The reference to Wayne Chastain consisted exclusively of the following three sentences:

> Also, MALS seems to be employing at least one attorney, Wayne Chastain, to do nothing but harass Juvenile Court Judge Kenneth A. Turner and court referees Curtis S. Person, Jr. and William Ray Ingram. Mr. Chastain works in concert with two convicted felons, Paul A. Savarin and Ricahrd E. Love. These individuals and Mrs. Alma Morris, the MALS client council chairperson, call frequent press conferences and stage street demonstrations against the Juvenile Court.

*Id.*

[2] Plaintiff's press clippings indicate that he further publicized the matter in speeches on "the dispute between Legal Services and Juvenile Court" given at the "Kennedy Democratic Club," with advance notice of time and place published in the local press. *Id.* Congressman Sundquist is a Republican.

[3] Mr. Chastain's letter "stated a belief that the persistent reluctance of [Juvenile Court] Judge Turner to comply with the Sixth Amendment right to effective counsel may violate federal civil rights laws." *See* App. E at 72a (letter of Stephen Trott, Assistant Attorney General, Criminal Division, Feb. 27, 1985, responding to Mr. Chastain's letter of Jan. 15, 1985).

Department declined to investigate charges against Mr. Chastain and referred Mr. Chastain's contentions about Memphis judges to the Civil Rights Division "for their information." App. at 72a.

2. Eleven months after Congressman Sundquist's letter, on December 9, 1985, Mr. Chastain instituted this suit against Congressman Sundquist in the Superior Court for the District of Columbia. The Complaint recited the foregoing background regarding the public controversy over MALS and child support enforcement and alleged five defamation causes of action. Three concerned statements in the letter to Attorney General Smith, as repeated to the public, App. D at 64a–66a, and two concerned another similar letter to the Legal Services Corporation, as repeated to the public. App. D at 66a–68a. Plaintiff sought money damages in the amount of $1 million ($500,000 actual; $500,000 punitive). Complaint, Prayer for Relief, App. D at 68a.

Congressman Sundquist removed the case to the United States District Court for the District of Columbia. He then filed a motion to dismiss based on official immunity. (In deference to this Court's decision in *Hutchinson* v. *Proxmire,* 443 U.S. 111 (1979), Congressman Sundquist did not argue the Speech or Debate Clause.) That motion was fully briefed and argued before the district court. On April 9, 1986, the district court granted the motion to dismiss with a detailed opinion. App. B at 54a–56a. The district court "read the complaint and construed the complaint in the light most favorable to the plaintiff." App. B at 56a. It first addressed Congressman Sundquist's letters. "[A]s to those communications, based on able Plaintiff's counsel's admission here in court," that the letters were within Congressman Sundquist's official duties as Congressman, the Court concluded that the letters to other federal officials from "this Member of Congress . . . [are] entitled to absolute immunity as official acts, as well as the doctrine of absolute immunity for common law torts." App. B at 54a.

The district court then turned to the release of the Congressman's statements on the MALS/child support issue to the media. The court also found these public communications to be official actions taken pursuant to Congressman Sundquist's "line of duty, namely, the general principles of a duty of a Member of Congress to inform the public." *Id.* at 54a. It found official immunity necessary because:

> [I]f this court were to hold otherwise . . . it would act, in effect, as a restraint on the exercise of the duties by a legislative official in respect to matters with wide public interest and concern, which would be far worse than a favorable expression on such matters and that if Congressman Sundquist, or any other Member . . ., were so restricted as the plaintiff's kinds of actions here would restrict them, then we would have very little information coming out from the members of Congress in the way of information involving broad-ranging public policies and, as a result, the public interest would suffer.

*Id.* at 56a. Plaintiff Chastain appealed.

3. On appeal, a divided panel of the D.C. Circuit reversed the district court. The panel majority (Buckley and Williams, JJ.) held that "members of Congress are *not* entitled to immunity for common law tort suits [even if] committed while acting within the scope of their official acts." App. A at 2a (emphasis supplied). That divided panel also intimated that Members lacked official immunity protection against any other type of tort suit as well. App. A at 31a.

To leave Congressmen, alone among federal officials, so unprotected in performing their official duties, the divided court of appeals panel engaged in a major reformulation of tort immunities. The panel continued to grant official immunity to judicial officials and "a greatly broadened scope of immunized activity . . . . down the chain of authority to 'officers of lower rank in the executive hierarchy.' " App. A at 21a (quoting *Barr* v. *Matteo*, 360 U.S.

564, 573 (1959)).[4] The divided panel accepted much of the basis for official immunity for legislative officials, recognizing, as plaintiff had conceded and the district court had held, that Representative Sundquist had acted within his official capacity. It found that there "is no doubt that [Rep. Sundquist's] action—commenting on the operation of MALS, a government-funded operation—falls within the scope of his official duties." App. A at 10a.

The panel majority also recognized that "the contemporary demands made on members of Congress," App. A at 16a, which include presenting views to the Executive Branch, communicating with constituents, and assisting constituents with government problem-solving (otherwise known as casework), are official in nature even though beyond the lawmaking protected by the Speech or Debate Clause. Moreover, the panel majority even recognized the "evident constitutional overtones," *id.* at 13a, of any cutback in official immunity for legislative officials.

Despite its recognition of these crucial premises for legislative officials' immunity, the panel decided nevertheless to "disqualif[y] members of Congress for the grant of official immunity." *Id.* at 35a. The panel majority relied heavily on the very questionable assumption that Members of Congress had no need for official immunity because Members, unlike executive and judicial officers, are not exposed to suit for their official duties "with predictable regularity." *Id.* at 25a. It attempted to justify its decision by contending that the "work of the legislative branch is to craft the general rules and policies"; legislators "do [their other official duties] as volunteers, and at their own risk, however important their myriad other ac-

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[4] "[F]or executive officials generally when defending against common law tort suits, the privilege is absolute, meaning the officials have a complete defense entitling them to summary judgment, subject only to the requirement that their actions fall within the outer perimeter of their official duties." App. A at 9a.

tivities may be." *Id.* at 35a.[5] The panel cited as support a number of cases of this Court concerning the limits of Speech or Debate immunity, virtually ignoring this Court's rulings on the doctrine actually in question—official immunity.

A forceful dissent by Judge Mikva rejected the majority's theories, and affirmed the necessity of official immunity for legislative, as well as judicial and executive, officials. Judge Mikva observed that the majority's doctrine "marks a dramatic departure from this Circuit's previous holdings in this area," App. A at 44a (dissenting opinion). Like the majority, the dissent recognized that Representative Sundquist had been acting within the scope of his official duties: "[t]he efforts of the defendant to call attention to what he considered to be problems within a legal services office were part of his job, and the comments at issue in this case were a part of that effort." *Id.* at 38a. Unlike the majority, however, the dissent considered this truth decisive. The dissent recognized that to make a Congressman's communications with his constituents vulnerable to continual litigation is to threaten the continuance of those communications and of the representative function itself.

The dissenting opinion warned that the majority's "precedent-denigrating result . . . . does damage to our government structure." *Id.* at 37a. Judge Mikva commented that "[t]he majority is far too dismissive of the important policy considerations militating in favor of congressional official immunity." *Id.* at 42a. He explained the high importance of the now-unprotected official duties of Members:

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[5] The two-judge majority further justified the cutback by contending that since the Speech or Debate Clause protects some of Members' official duties—those having to do directly with lawmaking—implicitly the Clause must bar any protection for the Members' other official duties. Allowing official immunity to legislators for their official duties "would reject the sufficiency of the constitutional schema." *Id.* at 28a.

> [S]uch official functions are of great significance in the workings of our government. In their role as representatives and ombudsmen, members of Congress perform a variety of non-legislative tasks that make this nation's government more responsive to its citizenry and that make this nation's citizenry more attentive to its government.

*Id.* at 43a. "The majority underestimates the role of Congress . . . [The majority's limit on what merited protection] is not the limit that the author of the opinion applied to his role as Congressman, nor that I did to my own." *Id.* at 43a.[6]

Representative Sundquist moved for reconsideration and suggested rehearing *en banc* by the D.C. Circuit. On January 27, 1988, by a vote of six in favor of rehearing to five against, one judge not participating, that circuit denied rehearing *en banc*. Only because rehearing required the vote of a majority of the twelve judges (including the nonparticipating judge), rather than just a majority of the eleven judges voting, did the six judges who voted for rehearing *en banc* fail to obtain it. This vote on rehearing reflects the consensus in the circuit below as to the importance of the case and the decision's far-reaching implications.[7]

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Presents a Question of Major Importance to the Separation of Powers.

This case presents a question going to the heart both of the Congress's functioning and of the relationship between the political and the life-tenured Branches. The sharply differing view of the district court and the panel majority, the vigorous dissent from the decision below by Judge Mikva, and the near-majority vote in the D.C. Cir-

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[6] Judge Buckley had served as a United States Senator from New York. Judge Mikva had served as a United States Representative from Illinois.

[7] Defendant's request for reconsideration of the denial of rehearing was denied.

cuit for rehearing *en banc*, all reflect the highly significant and controversial nature of the panel majority's sweeping new doctrine. At issue is whether officials of the Legislative Branch will receive the same protection from vexatious tort suits that is accorded to officials of both of the other Branches of the government. This case decides whether a vital pillar of the separation of powers will stand or fall.

The reasons why this question so strongly affects Congress, and necessitates review by this Court, start with the very notion of what it means for a government to function. As this Court said in *Scheuer* v. *Rhodes,* 416 U.S. 232, 241–42 (1974) (emphasis supplied and quotation omitted):

> It is not a tort for government to govern . . . Public officials, whether governors, mayors or police, *legislators* or judges, who fail to make decisions when they are needed or who do not act or implement decisions when they are made do not fully and faithfully perform the duties of their offices.

If officials in any Branch fail to perform their official duties because they are unprotected for so doing, "government" simply will not "govern." [8]

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[8] "Like *legislators* and judges, [executive] officers are entitled to rely on traditional sources for the factual information on which they decide and act," and therefore to receive official immunity for decisions and actions. *Scheuer,* 416 U.S. at 246 (emphasis supplied). "It would seriously cripple the proper and effective administration of public affairs" if each official were "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages." *Spalding* v. *Vilas,* 161 U.S. 483, 498 (1896). "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Barr* v. *Matteo,* 360 U.S. 564, 572 (1959) (quoting *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.), *cert. denied,* 339 U.S. 949 (1950).). These analyses are just as applicable to the Legislative Branch as to the Executive or Judicial.

Defamation suits threaten a particularly sensitive and vital official activity—communication with other officials and with the general public. *Barr* v. *Matteo*, 360 U.S. 564 (1959), this Court's seminal case precluding defamation suits against federal officials, conferred official immunity on an acting director of a rent stabilization board who issued a defamatory press release criticizing a government employee. Thus, *Barr* concerned an allegedly improper public statement much like that of Representative Sundquist in this case. The Court declared:

> The issuance of press releases was standard agency practice. . . . We think that under these circumstances a publicly expressed statement of the position of the agency head . . . was an appropriate exercise. . . . It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement . . . in respect to matters of wide public interest and concern is not action in the line of duty.

*Barr* v. *Matteo*, 360 U.S. at 574–75.[9]

Accordingly, the courts have recognized a need for official immunity protection from defamation suits for a wide range of officials. Such officials as a NASA center director, a Smithsonian department chairman, an Army commander, administrative law judges, a tax collector, a bank examiner and a press officer, have all received the immunity.[10] Similarly, the courts have time and time

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[9] Justice Black further explained:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. . . . Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

*Barr* v. *Matteo*, 360 U.S. at 577 (concurring opinion).

[10] *Bush* v. *Lucas*, 462 U.S. 367, 371 (1983) (NASA center director); *Strothman* v. *Gefreh*, 739 F.2d 515 (10th Cir. 1984), *aff'd after remand*, 808 F.2d 1399 (10th Cir. 1987) (administrative law judges); *George* v. *Kay*, 632 F.2d 1103 (4th Cir. 1980) (postal inspector); *Expeditions Un-*

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again reaffirmed the need for judicial immunity from defamation suits.[11] Yet, under the panel's holding, Congressmen do not qualify for such protection; "Congressmen [would not even] qualify for the immunity that courts have given to postmen." App. A at 37a (dissenting opinion).[12]

This withholding of official immunity from Congress would interfere with a major part of federal governmental communications. Communications by Members of Congress with agencies and constituents, even when not for lawmaking and thus outside the Speech or Debate Clause, have been held repeatedly by this Court to constitute action by Members "in their official capacity," *Gravel* v. *United States*, 408 U.S. 606, 625 (1972); *accord, United States* v. *Brewster*, 408 U.S. 501, 512, 524 (1972). For that

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*limited* v. *Smithsonian Institution*, 566 F.2d 289, 294 (D.C. Cir. 1977) (en banc), *cert. denied*, 438 U.S. 915 (1978) (Smithsonian department chairman); *Mandel* v. *Nouse*, 509 F.2d 1031 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975) (Army commander); *Sowders* v. *Damron*, 457 F.2d 1182 (10th Cir. 1972); *Molever* v. *Lindsey*, 411 F.2d 597 (6th Cir. 1969) (bank examiner); *David* v. *Cohen*, 407 F.2d 1268 (D.C. Cir. 1969) (tax collector); *Queen* v. *TVA*, 689 F.2d 80, 82 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (press officer). The divided panel suggested that executive officials receive official immunity because they face lawsuits "with predictable regularity" as "a daily, omnipresent, inescapable threat," in contrast to legislators. App. A at 25a–26a. A Smithsonian department chairman, or a NASA center director, have far less need to make controversial statements to the public than does a Member of Congress, and the panel's implication to the controversy makes little sense.

[11] *E.g., Taylor* v. *West Pub. Co.*, 548 F. Supp. 61, 62 (D. Minn.), *aff'd.*, 693 F.2d 837 (8th Cir. 1982); *Lowenschuss* v. *West Pub. Co.*, 402 F. Supp. 1212, 1215 (E.D. Pa. 1975), *aff'd.*, 542 F.2d 180 (3rd Cir. 1976); *see Stump* v. *Sparkman*, 435 U.S. 349 (1978) (judicial immunity against constitutional torts).

[12] Judge Mikva's description of the majority's disdain for Members of Congress, compared to other officials, can easily be extended, for in the interest of preserving good government the courts have conferred official immunity on the oft-maligned but rarely sued official, the dog catcher. *See Alfred* v. *Svarczkopf*, 573 F.2d 1146 (10th Cir. 1978); *see also Kostiuk* v. *Town of Riverhead*, 570 F. Supp. 603 (E.D.N.Y. 1983).

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matter, even the panel majority below joined the panel dissent and the district court in recognizing that such communications occur in Members' official capacity.

Such communications occur on an enormous scale. Congress assists each year with approximately a million constituent cases (typically, individuals' problems with federal agencies), which require extensive communications with constituents and agencies.[13] Congress mails more than 750 million pieces of official mail in some years.[14] The additional communications with agencies and constituents by phone must be reckoned as commensurately extensive. Since the panel majority renders unprotected such official communications, all of this now represents exposure to tort suits.

Of course, not every Congressional communication generates a lawsuit. However, by the same token, neither does every agency statement. The crucial point is the inherent tendency of such statements to anger and to arouse other passions that produce litigation. Much of what legislators communicate to agencies and constituents excites political passions, as did Representative Sundquist's communications about MALS. As Chief Justice Burger noted, echoing Justice Frankfurter, "[i]n

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[13] In 1977 representatives estimated their average caseload at slightly more than 10,000 cases a year. Senators from small states averaged between 1,000 and 2,000 according to a 1977 study; large-state senators had from 8,000 to 70,000 cases. Senators from New York and California receive between 30,000 and 50,000 cases each year.

R.H. Davidson & W.J. Oleszek, *Congress and its Members* 125 (1981) (footnotes omitted). For studies of casework and its importance, see Johannes, *The Distribution of Casework in the U.S. Congress: an Unequal Burden*, 5 Legis. Stud. Q. 517 (1980); Johannes, *Casework as a Technique of U.S. Congressional Oversight of the Executive*, 4 Legis. Stud. Q. 325 (1979).

[14] In Fiscal Year 1986, the House mailed nearly 461.1 million pieces of mail, and the Senate over 297.6 million pieces of mail. *Legislative Branch Appropriations for 1988: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 100th Cong., 1st Sess. 107 (1987).

times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct, and as readily believed." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 509 (1975) (quoting *Tenney* v. *Brandhove*, 341 U.S. at 378).

Members' communications with constituents and agencies constitute one of our democracy's main channels of popular accountability and responsiveness.[15] This Court has previously viewed the official immunity for such communications as worthy of certiorari and protection. In the companion case to *Barr*, *Howard* v. *Lyons*, 360 U.S. 593 (1959), the plaintiff sued a naval officer for defamation for his statement "to the members of the Massachusetts delegation in the Congress of the United States." *Id.* at 596. This Court granted certiorari specifically to examine the naval officer's "plea of absolute privilege in respect of the publications to members of Congress." *Id.* at 596.

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[15] To withhold official immunity from legislative officials would "impose prior censorship on all congressional documents on pain of personal liability for damages." *Doe* v. *McMillan*, 566 F.2d 714, 719 (D.C. Cir. 1977). Judicial interference in public communications by Members "would tend to undermine the representative nature of the democratic process and the legislator's responsibility to the electorate to account for his actions." *United States* v. *Ford*, 830 F.2d 596, 601 (6th Cir. 1987). In words which Congressman Sundquist might have addressed to the panel majority, Thomas Jefferson and James Madison set out the disastrous effect of such judicial interference:

> [F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other . . . *is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation,* which requires essentially that the representative be as free as his constituents would be . . .; is to do away the influence of the people over the proceedings of their representatives by excluding [them] from knowledge. . . .

"Protest against interference of Judiciary between Representative and Constituent," in 8 *The Works of Thomas Jefferson* 322, 325–26 (Fed. ed. 1904) ("*Protest*") (emphasis added).

*Lyons* held that "the District Court was correct in finding that the circulation of the report to the Massachusetts congressional delegation was 'in the discharge of [petitioner's] . . . official duties,' " *id.* at 598. Specifically, "the sending of copies of the report here at issue to members of the Massachusetts congressional delegation was part of petitioner's official duties," *id.* at 597. It creates an ominous, and indefensible, disparity between the Branches if this Court protects agency communication of views to a Congressman as in *Lyons*, but leaves unprotected Congress's communication of views to an agency as in this case.[16]

The two-judge panel decision threatens to open a Pandora's box of tort suits by those who disagree with, or are offended by, Members of Congress. A public employee whose effectiveness a Member questions could sue for defamation, in contrast to the decision in *Hartley* v. *Fine*, 780 F.2d 1383 (8th Cir. 1985) (state legislator sued). A dissatisfied constituent whose problems a Congressman fails to solve could sue for negligence, in contrast to the ruling in *Karchin* v. *Metzenbaum*, 587 F. Supp. 563 (N.D. Ohio 1983). A losing participant in agency proceedings whose side a Congressman opposed could sue for violation of due process. *Cf. Pillsbury Co.* v. *Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966) (overturning agency decision on ground that Congressional involvement violated due process). It may be that anyone contending a Member has infringed any theoretical constitutional penumbra could

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[16] The basic principles of democracy would suggest that if any disparity should exist, and it is hard to see why one should, the disparity should favor allowing the elected representatives to speak on controversial subjects. Surely it is at least as important that accountable elected legislators vested by § 1 of Article I of the Constitution with "[a]ll legislative Powers" take part in public debate than for lower-level agency employees to do so. Yet the divided panel held the Members to be unprotected "volunteers" in writing to officials, while lower-level agency employees receive protection.

bring a *Bivens*-type tort action. *Davis* v. *Passman*, 442 U.S. 228 (1979).[17]

In short, the sweeping decision below ironically singles out what are, as a class, the most active, visible, and communicative of federal officials—Members of Congress—to be vulnerable, stripping them of the official immunity that protects all other officials. The panel's decision announces that every state and district in the country has sent to the Capitol a walking deep pocket. The causes of action to be filed against this singularly exposed group will know no limit.

Unlimited tort litigation against a co-ordinate Branch imposes a special and intolerable injury on the separation of powers. To allow use of the courts to combat Congressional speech and Congressional speech alone would cause "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government [that] will not, in the long run, be beneficial to either." *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Justice Powell warned that "[w]e should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." *Id.*

In fact, this Court has always recognized the great menace inherent in inviting litigation against Members

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[17] The panel majority suggested that it was only stripping Members of protection from common law tort suits, without deciding whether immunity exists for constitutional and statutory torts. Even the two-judge majority putting forth this distinction did so without much conviction; its preference was to frankly deny legislators official immunity for any tort. "By extension of the arguments presented here, Speech or Debate immunity may avoid the need for qualified immunity from constitutional and statutory torts, as well as for immunity against common law torts." App. A at 31a. As a practical matter, there could be little justification in protecting Members of Congress against the higher claims of constitutional and statutory allegations if ordinary common law torts might be freely alleged.

of Congress. When litigants sue legislators, the Members suffer "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). The "social costs" of such suits "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982).[18] "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).[19] To the prospect of such lengthy and distracting lawsuits must be added the "hazard of a judgment against [legislators] based upon a jury's speculation as to motives." *Lake County Estates, Inc.* v. *Tahoe Regional*

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[18] Lawsuits injure all defendants, but:

> [p]articularly for a Member of Congress, however, publicity will be widespread and devastating. Should an election intervene before a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career.

*United States* v. *Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980) (describing effect of criminal indictment).

[19] Such suits may drag on almost endlessly due to the strong feelings awakened, the numerous constitutional issues likely to arise, and the intrusive discovery. One tort suit against a Senator and staff continued from 1969 to 1985, with all manner of hearings, a full-length trial, and multiple appeals, including repeated visits to this Court. *McSurely* v. *McClellan*, 753 F.2d 88, 94-96 (D.C. Cir.) (describing the complex history of the litigation), *cert. denied*, 474 U.S. 1005 (1985). Only the understanding of a panel of the D.C. Circuit, different than the one in this case, that Members received official immunity, 753 F.2d at 99, brought that case to an end as it approached its third decade.

*Planning Agency*, 440 U.S. 391, 405 (1979) (quoting *Tenney* v. *Brandhove*, 341 U.S. at 377.) [20]

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Id.* (quoting *Tenney* v. *Brandhove*, 341 U.S. at 377). These firmly established principles led Judge Mikva to warn against the result of the decision below: "[w]ithout congressional immunity, we are liable to have a Congress that is deterred from the vigorous exercise of its constitutional responsibilities." App. A at 37a (dissenting opinion).

The Framers recognized the danger to the separation of powers posed by routinely subjecting Congressional speech to the threat of litigation.[21] Thomas Jefferson and James Madison expressed the vital part played in the separation of powers by Members' speech in their "Protest against interference of Judiciary between Representative and Constituent." 8 *The Works of Thomas Jefferson* 322 (Fed. ed. 1904) ("*Protest*").[22] In that "Protest," written in

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[20] "As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), '[t]he justification for. . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. . . .' " *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 n.32 (1982).

[21] " 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.' " *Tenney* v. *Brandhove*, 341 U.S. at 373 (quoting II *Works of James Wilson* 38 (Andrews ed. 1896)).

[22] Jefferson's and Madison's attention was attracted and their indignation provoked by the difficulties suffered by the Representative from their own Virginia district, Samuel Jordan Cabell. Cabell had sent out a "circular letter," or newsletter, to his constituents criticizing the conduct of President Adams' administration with respect to

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defense of a Representative accused of criminal defamation, these Framers said that "the people have professed the right of being governed by laws to which they have consented by representatives chosen by themselves immediately" and therefore:

> in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, *it was part of the common law,* adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and *that their communications with their constituents should of right, as of duty also, be free, [and] full. . . .*

*United States* v. *Ford,* 830 F.2d at 601 (emphasis supplied) (quoting the *"Protest"*).[23]

Finally, the panel's decision would channel disputes into the courts which more properly belong in the political sphere. Plaintiff Chastain demonstrated in this case the availability of those preferable political channels, by his own well-publicized statements, by his writing to the Attorney General, and by his speech to a political group. Such political responses to Members' statements bring vitality to the political process. By contrast, the divided panel's open invitation to litigiousness would turn the courts into a roving commission on the propriety of Members' daily behavior, and on the correctness of their pub-

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the war in France. In response, a grand jury was convened to inquire into the "unfounded calumnies" contained in the circular letter.

[23] The divided panel offered, as a "policy" reason to deny official immunity to legislative officials, a discussion of cases in the late 1700s and early 1800s when legislators were found liable for defamation. App. A at 16a-22a. However, such an argument proves too much, for at that time, executive officials had no official immunity either. "[T]he executive privilege in defamation actions would appear to be a judicial creature of less than 65 years' existence." *Barr* v. *Matteo,* 360 U.S. 564, 582 (1959) (Warren, C.J., dissenting). Moreover, Jefferson's discussion reflects principles more important to the American system than the cases cited by the divided panel.

licly expressed opinions.[24] "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney* v. *Brandhove,* 341 U.S. at 378.

2. The Decision Below Conflicts With Decisions in Other Circuits and Will Generate Widespread Confusion.

No other court has agreed with the panel majority's position on this signally important issue of official immunity for legislators. In fact, if the decision below stands, the conflicting holdings of the circuits will generate widespread confusion. The Fifth, Eighth, and Ninth Circuits, and a number of district courts, conflict sharply with the new doctrine of the D.C. Circuit. Federal, state, and local legislators have been sued in a variety of nonlawmaking contexts, but until now all courts have accorded official immunity to the threatened legislators. *Hartley* v. *Fine,* 780 F.2d 1383, 1287 (8th Cir. 1985)(defamation by letter from state legislator; official immunity); *Morrison* v. *Jones,* 607 F.2d 1269, 1274 (9th Cir. 1979)(approval of fund request for patient's transportation out of the country; official immunity); *Kuzinich* v. *County of Santa Clara,* 689 F.2d 1345, 1350 (9th Cir. 1982)(direction to bring abatement action against adult theatre; official immunity); *Minton* v. *St. Bernard Parish School Board,* 803 F.2d 129, 135 (5th Cir. 1986); *Jones* v. *Diamond,* 519 F.2d 1090, 1100–01 (5th Cir. 1975)(jail conditions; official immunity); *Hamilton* v. *Covington,* 445 F. Supp. 195, 200 (W.D. Ark. 1978)(failure to provide jail attendant; official immunity); *Karchin* v. *Metzenbaum,* 587 F. Supp. 563 (N.D. Ohio 1983)(Senator's negligent handling of constituent casework; official immunity); *Dunlap* v. *Wahlstrom,* Civ. Action No. 82–184 (E.D. Ky., July 6, 1983), *aff'd,* 738 F.2d 438 (6th Cir. 1984)(Congressman's role in grant contract;

[24] The underlying facts of this case illustrate the danger. Plaintiff's initial pleadings spoke far more of Mr. Chastain's clients' needs and the allegedly retrograde views of Congressman Sundquist than of reputational damage to Mr. Chastain.

official immunity); *Hicks* v. *Bieber*, Civ. Action No. 84-0882 (E.D.N.Y., Dec. 23, 1985)(Congressman's role in grant contract; official immunity).

Sometimes the official immunity recognized has been absolute in nature, and at other times less than absolute. Generally, the choice has depended on what level of official immunity would be accorded an executive official in a similar situation. However, the legislators have never received less immunity than executive officials. For example, *Hartley* v. *Fine*, 780 F.2d 1383 (8th Cir. 1985), concerned, as does this case, a legislator who wrote a letter to an executive official about a government employee, who subsequently sued the legislator. The Eighth Circuit noted that the defendant Missouri State Senator had substantiated "his contention that he properly acted within the scope of his legislative office" when he wrote a state executive official calling for the discharge of an employee. It concluded that the legislator was "entitled to the district court's submission of the qualified immunity instruction." *Id.* at 1387 (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)).[25]

Both *Hartley* and this case concerned legislators' letters about government employees, but the Eighth Circuit, in contrast to the D.C. Circuit, allowed legislators to claim official immunity. The *Hartley* ruling aligns the Eighth Circuit with the Fifth and Ninth Circuits, both of which recognize official immunity from civil law tort suits for legislators. *See Kuzinich* v. *County of Santa Clara* (9th Cir.); *Jones* v. *Diamond* (5th Cir.). Only the D.C. Circuit has now staked out a conflicting position.

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[25] *Hartley* was a case, unlike this one, in which official immunity did not call for pretrial dismissal of the complaint. It should be noted that *Hartley*'s defendant, a state legislator, could hardly be entitled to greater immunity protection than Congressman Sundquist, a federal legislator. Federal legislators receive at least as much immunity protection as state legislators, if not more. *See United States* v. *Gillock*, 445 U.S. 360 (1980)(state legislators receive less immunity than federal legislators because separation of powers between co-ordinate Branches does not protect them from federal courts).

Moreover, the Sixth Circuit has signaled a point of view compatible with the Fifth, Eighth, and Ninth Circuits. It recently reversed an order curbing pretrial communications by an indicted Representative to the public and to his constituents. *See United States* v. *Ford.* That circuit explained:

> We agree with the House leadership that the doctrine of separation of powers—a unique feature of our constitutional system designed to insure that political power is divided and shared—would be undermined if the judicial branch should attempt to control political communication between a congressman and his constituents.

*United States* v. *Ford,* 830 F.2d at 601 (quoting *"Protest"* at 322). That Circuit's decision clashes sharply with the view of the two-judge majority in this case that legislators' communications are beneath the protection of the law and are merely the product of "volunteers."

Besides this open split among the Circuits caused by the ruling of the D.C. Circuit, an added source of confusion for the lower courts is the contradiction within the D.C. Circuit's own precedents. Three times before, the D.C. Circuit had accorded official immunity to legislative officials. In *McSurely* v. *McClellan,* the D.C. Circuit afforded Senate defendants "public officials' qualified 'good faith' immunity from civil damages actions," 753 F.2d at 100; *see id.* at 115 ("this court has said [before] that qualified immunity may apply to legislative branch personnel"). In *Walker* v. *Jones,* 733 F.2d 923, 932 (D.C. Cir.), *cert. denied,* 469 U.S. 1036 (1984), the D.C. Circuit noted that "Members of Congress may assert the same qualified immunity available to executive officials." Finally, *Doe* v. *McMillan,* 566 F.2d at 719, also recognized the applicability of official immunity to legislative officials.

The conflicts between the circuits, the D.C. Circuit's own contradictory opinions, and the resulting confusion, create an impossible situation for the Congress. Whether Members of Congress can safely perform their official duties now depends on whether they are subject to suit in

districts in the Fifth, Sixth, Eighth, or Ninth Circuits, or in the Capitol (i.e., the D.C. Circuit). If they are in a district outside one of the circuits which has ruled, they may have no guidance at all, except to guess where their circuit would line up. Litigants desiring to sue a Member could go forum-shopping for the federal circuit they prefer. It cannot remain the law for a Congress with national responsibilities and national tort suit exposure to find its ability to act varying from place to place and from forum to forum, depending even on facts so arbitrary as whether Members take some incoming phone call, or where they hold a meeting—in their district or in Washington. Congress needs a nationally uniform rule governing its exposure. Only this Court can resolve the issue definitively.

3. The Decision Below Conflicts With Decisions of This Court.

The unanimous view of other circuits, rejecting the view newly espoused by the divided panel below, reflects accurately this Court's precedent. As this Court explained, while dismissing a common law tort suit against legislators for alleged invasion of privacy, "[b]oth before and after *Barr* [v. *Matteo*], *official immunity has been held applicable to officials of the Legislative Branch.*" *Doe* v. *McMillan,* 412 U.S. 306, 319 n.13 (1973) (emphasis supplied; citations omitted). As Judge Mikva noted below, "[t]his statement [in *Doe*], taken on its face, supports Sundquist's position—indeed, decides this case." App. A at 42a (dissenting opinion).[26]

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[26] The holding in *Doe* v. *McMillan* concerned Speech or Debate immunity rather than official immunity. Accordingly, the divided panel speculated that while this Court's statement in *Doe* refers explicitly to "official immunity," the Court did not mean it, but rather meant "activities in essence covered by the Speech or Debate Clause, but arising in a sufficiently oblique circumstance as to preclude direct application of the constitutional provision." Slip op. at 16. To provide any official immunity beyond Speech or Debate protection would "in effect rewrite

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*Doe* v. *McMillan* simply applied this Court's consistent functional approach to official immunity, recently reiterated in *Forrester* v. *White*, 56 U.S.L.W. 4067, 4068 (Jan. 12, 1988). The Court reminded in *Forrester* that "[r]unning through our cases, with fair consistency, is a 'functional' approach to immunity questions . . . ." The "functional" approach means that the Court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . evaluate[s] the effect that exposure to particular forms of liability would likely have on the appropriate exercise on the function." *Id.*

A functional approach allows officials to receive a particular level of immunity without regard to what Branch they are in, depending only on whether their official duties call for such protection. For example, in *Forrester*, the Court noted that while judges receive absolute immunity when performing judicial functions, they receive a different form of official immunity for performing other functions such as for administrative employment decisions. *See* 56 U.S.L.W. at 4070 (lack of absolute immunity for administrative employment decisions does "not imply that qualified immunity . . . is unavailable to judges for their employment decisions").[27] Executive officials re-

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the clause," *id.* at 28; *see also* slip op. at 6–7, 10–12, 14–15, and 34 (further discussions of *Doe*).

This argument by the panel majority would produce the self-contradicting result that the officials whom the Constitution most explicitly protected—Members of Congress—receive the least immunity precisely because of that explicit protection, while other Branches—given no textual protection from lawsuit—receive the most immunity. Such a labored doctrine neither makes inherent sense, nor accords with the contemporaneous understanding of *Doe* v. *McMillan*. On remand in *Doe*, the legislative defendants were accorded official immunity; they "ha[d] available a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity," *Doe* v. *McMillan*, 566 F.2d at 719.

[27] In its most varied case, this Court held that judges receive judicial immunity when performing judicial functions, receive legislative

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ceive qualified immunity when performing most executive functions even at the Cabinet level, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), but receive "judicial" immunity for performing the adjudicative function of deciding administrative cases. *Butz* v. *Economou*, 438 U.S. 478 (1978).

The Court's functional approach clearly necessitates official immunity for legislators. When performing lawmaking functions, legislators receive the absolute Speech or Debate immunity. When they perform other official but non-lawmaking functions similar to those which executive officials perform, such as reporting views to other officials (as in Congressman Sundquist's letter to the Attorney General) or announcing official positions (as in Congressman Sundquist's statements on the Memphis court dispute), they should receive the official immunity that executive officials do.[28]

The divided panel diverted attention from the official immunity question by relying heavily on a Speech or Debate Clause analysis, even though the panel knew that Congressman Sundquist had "stat[ed] forthrightly that he is not claiming Speech or Debate immunity." App. A at 5a. Specifically, the majority opinion stresses *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), which held that the Speech or Debate immunity did not apply to Members' speeches off the Congressional floor. App. A at 12a. How-

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immunity when performing the "legislative" function of propounding a code of conduct for attorneys, and receive prosecutorial immunity when enforcing such a code. *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 466 U.S. 719 (1980); *see Atcherson* v. *Siebenmann*, 805 F.2d 1058, 1063–67 (8th Cir. 1979) (judge acting in an executive rather than judicial capacity obtains qualified immunity); *see also Martero* v. *City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (prosecutor making public statements is acting outside his quasi-judicial function, but still receives qualified immunity from defamation).

[28] In fact, *Forrester* itself virtually so states, when it distinguishes between denying Speech or Debate protection for legislators performing some functions (firing employees) and granting those same legislators official immunity of the kind an executive official would receive (a question reserved, but with the answer strongly implied). 56 U.S.L.W. at 4069.

ever, the fact that *Proxmire* and other cases apply the Speech or Debate immunity only to lawmaking functions has nothing to do with the propriety of the divided panel's ruling in this case. The question of official immunity was never raised in *Hutchinson* v. *Proxmire*. That case sets forth no holding, nor even a dictum, on the issue, does not offer the plaintiff a way to wipe out official immunity, and does not provide a reason to forego ruling on official immunity. Defendant here claims the official immunity which should protect him just as it would protect all executive and judicial officials in similar situations. *Proxmire*'s analysis of whether that function is lawmaking is thus irrelevant.[29]

Judge Mikva noted the difference between the lawmaking-only Speech or Debate privilege involved in *Hutchinson* v. *Proxmire*, and the official immunity which Representative Sundquist shares with executive and judicial officials. "Speech or Debate Clause immunity and judicially created official immunity offer distinctly different protections. The former grants members of Congress a testimonial privilege and protects them from all civil and criminal proceedings. The latter, in its strongest form, protects officials only from civil suits for damages." App. A at 41a (dissenting opinion).[30] Thus, in sum, the Court does not

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[29] As Judge Mikva explained:

> The respondent in *Hutchinson* did not claim official immunity; he only claimed immunity under the Speech or Debate Clause. In limiting the application of Speech or Debate Clause immunity to matters within the legislative sphere, the Supreme Court has neither explicitly nor implicitly negated the application of judicially created official immunity to activities outside that sphere.

App. A at 41a (dissenting opinion).

[30] As Judge Mikva concluded:

> The lesson of the Supreme Court cases construing the Speech or Debate Clause is that members of Congress will not receive the blanket Speech or Debate Clause immunity when they act outside the legislative sphere. *Hutchinson* cannot be read to

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face a reprise of Speech or Debate questions previously decided. It faces a new and crucial official immunity question concerning whether Members receive the same protection as all other federal officials, a question with vital impact on Congress's ability to function.

## CONCLUSION

This case presents an issue of fundamental importance to Congress and the separation of powers. The decision below conflicts with other federal courts and contravenes the dictates of this Court. It threatens the autonomy and effectiveness of the Legislative Branch and the viability of the very notion of representative government. For these seasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APRIL 1988.

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mean that members of Congress will receive *no* official immunity when they act outside that sphere. Thus, to recognize official immunity for members of Congress would not circumvent the Supreme Court's Speech or Debate Clause jurisprudence; rather, it would apply a distinct immunity doctrine in a manner perfectly consistent with the Court's Speech or Debate Clause cases.

*Id.*

**Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.**

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 86-5386**

**WAYNE CHASTAIN, APPELLANT**

**v.**

**DON SUNDQUIST**

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**Appeal from the United States District Court for the District of Columbia**
**(D.C. Civil Action No. 85-4037)**

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**Argued February 12, 1987**

**Decided November 6, 1987**

***Bernard Fensterwald III*** **for appellant.**

***Steven R. Ross***, **General Counsel to the Clerk, U.S. House of Representatives, with whom** ***Charles Tiefer***, **Deputy General Counsel to the Clerk, U.S. House of Representatives, was on the brief, for appellee.**

**Before MIKVA, BUCKLEY, and WILLIAMS,** ***Circuit Judges.***

**Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.**



84-295 O - 88 - 3

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Circuit Judge* MIKVA.

BUCKLEY, *Circuit Judge*: A member of Congress acting within the scope of his authority claims official immunity from a common law defamation suit. This claim of privilege has never been approved by the Supreme Court or recognized in this or any other circuit. We reaffirm the common law rule and settled constitutional design that elected representatives must answer for libelous statements made outside the scope of their legislative duties.

Appellant Wayne Chastain, a staff attorney employed by the Memphis Area Legal Services, Inc. ("MALS"), alleges that appellee Congressman Don Sundquist, representing the Seventh District of Tennessee, libeled appellant in a two-page letter sent to the Attorney General and released by Sundquist to the media and in a letter sent to the Legal Services Corporation. The district court, in a brief opinion delivered from the bench, dismissed the action, holding that the posting of the letters to the Attorney General and the Legal Services Corporation was an official act of a legislator immune from suit under the Speech or Debate Clause of the Constitution, art. I, § 6, cl. 1, and the release of the letter to the media was within the scope of Sundquist's official duties and therefore absolutely immune from common law suit under the reasoning of *Barr v. Matteo*, 360 U.S. 564 (1959), and supporting cases. Appendix for Appellant (App.) at 103-07.

We find that the communication between Congressman Sundquist and the executive branch is not protected by Speech or Debate immunity. As to appellee's decision to publicize his views in the media and to the executive branch, we hold that members of Congress are not entitled to immunity for common law torts committed while acting within the scope of their official duties but outside

the sphere protected by the Speech or Debate Clause. Accordingly, we reverse the order of the district court dismissing appellant's complaint.

## I. BACKGROUND

Chastain and other attorneys associated with MALS have been involved since 1978 in a legal dispute with the Juvenile Court of Memphis and Shelby County. The Juvenile Court supervises the collection of child support payments from parents. MALS has alleged that the procedures the Juvenile Court uses to collect these payments violate the constitutional rights of indigent parents. In 1984, Chastain, on behalf of MALS, successfully argued to the Sixth Circuit that indigent parents under custodial interrogation for non-payment of support are entitled to counsel and that those responsible for subsequent illegal jailing could be held liable for damages. *See Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984). The protracted controversy also includes allegations that the Juvenile Court has a financial incentive to collect payments from indigents receiving federal and state assistance. *Id.* at 265; Brief for Appellant at 4-7.

On January 14, 1985, appellee wrote the letter to then-Attorney General William French Smith that is at issue in this litigation. App. at 12-13. Typed on official congressional stationery, the five-paragraph letter noted his concern that MALS might be obstructing the administration of the Child Support Enforcement laws. The third paragraph turned directly to the activities of appellant:

> Also MALS seems to be employing at least one attorney, Wayne Chastain, to do nothing but harass Juvenile Court Judge Kenneth A. Turner and court referees Curtis S. Person Jr. and William Ray Ingram. Mr. Chastain works in concert with two convicted felons, Paul A. Savarin and Richard E. Love. These individuals and Mrs. Alma Morris, the MALS client council chairperson, call frequent press-

> conferences and stage street demonstrations against the Juvenile Court.

*Id.* at 12.

In the fourth paragraph, appellee states his concern that

> these individuals, utilizing the services, staffs, and facilities of a federally funded agency, should be allowed to launch such a concerted effort to discredit a major federally funded child support enforcement program.

*Id.*

In light of "alleged irregularities" and the "possibility of the obstruction" of law, the letter urged that the Attorney General conduct "whatever . . . investigation [he] deem[s] appropriate." *Id.* at 13. The letter also noted the legislative background—unanimous approval in the House and Senate of an "Administration backed bill to strengthen the collection of delinquent child support payments." *Id.*

Appellant alleges that a copy of the letter, along with a press release, was distributed to the media in Memphis, "including the *Commercial Appeal*, a daily newspaper which has a circulation in excess of 200,000 subscribers in four states, various other publications, radio stations and television stations." Brief for Appellant at 7; App. at 2, 5. According to the complaint, appellee repeated "some" of the letter's defamatory allegations at a civic luncheon in Memphis. App. at 3.

On February 13, 1985, appellee wrote to the Legal Services Corporation reiterating his concern about MALS and his belief that it was obstructing enforcement of the child support laws. He stated his belief that MALS was engaged in "lobbying activities—activities which I believe are contrary to the purpose and goals of the LSC and actually serve to obstruct the administration of federal law." App. at 17. No individuals were named in

this second letter. In response, the LSC sent an investigator, Steven Aronson, who conducted a five-day investigation. Appellee thereafter held a press conference, reporting that the situation at MALS was "even worse" than imagined. Brief for Appellant at 10. Appellant twice thereafter sought a retraction, to no avail.

Appellant filed suit on December 9, 1985 in the Superior Court of the District of Columbia alleging five counts of defamation. Appellee removed the case to the federal district court, where he filed a motion to dismiss based on official immunity. The court granted the motion, holding that the communications with the Attorney General and the LSC were protected by the Speech or Debate Clause. App. at 104. The release to the press, said the court, fell within the *Barr* grant of absolute immunity to federal officials for common law torts. App. at 106.

## II. Discussion

### A. *The Speech or Debate Clause*

We first dispose of the issue whether appellee's letters sent to the Attorney General and the LSC constitute legislative activity protected by the Speech or Debate Clause. U.S. Const. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."). Appellee essentially concedes the issue in his brief, stating forthrightly that he is not claiming Speech or Debate immunity. Brief for Appellee at 10. The district court, on the other hand, ruled without explanation that the interbranch communications are protected by the constitutional provision, so we briefly address the issue. *See* App. at 104.

The Speech or Debate Clause protects all lawmaking activities undertaken in the House and Senate, but affords no constitutional immunity beyond its carefully defined scope. Thus actions taken in committee hearings,

proceedings, and reports, or by vote, even though not always literally "words spoken in debate," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), fall within the constitutional zone of protection. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *Tenney v. Brandhove*, 341 U.S. 367 (1951). Should a member choose to publish even an exact copy of a speech delivered in Congress, however, he loses his constitutional protection. *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) (press releases are "primarily means of informing those outside the legislative forum").

This basic schema makes one fact of legislative life exceedingly clear. The Clause prospects only "purely legislative activities," *United States v. Brewster*, 408 U.S. 501, 512 (1972)—i.e., acts inherent in the legislative process. As the Supreme Court has stated,

> [i]nsofar as the Clause is construed to reach . . . matters [beyond speech or debate], they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

*Gravel v. United States*, 408 U.S. at 625. The Clause thus does not protect acts that are not "legislative in nature," even if they are taken in a member's "official capacity." *Id.*; *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (the Speech or Debate privilege does not extend to "official activities of Congress members . . . outside the legislative core." (internal quotation marks omitted)).

In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Supreme Court applied these principles to facts in many respects similar to those in the case at bar, and held the

activities fell outside the ambit of the Speech or Debate Clause. The plaintiff in *Proxmire* had sued a member of Congress for making allegedly defamatory statements in a widely distributed press release and in several telephone calls to executive agencies. In discussing the press release, the Supreme Court stated that "the transmittal of . . . information by individual Members in order to inform the public . . . is not a part of the legislative function or the deliberations that make up the legislative process." *Id.* at 133. The Court therefore held that the Speech or Debate Clause did not protect the issuance of the press release. With regard to the telephone calls, the Court stated that "[r]egardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies . . . ." *Id.* at 121 n.10; *see also Doe v. McMillan*, 412 U.S. at 313 ("Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.'" (quoting *Gravel v. United States*, 408 U.S. at 625)). Because the Court found that the purpose of the telephone calls was to influence executive officials, the Court held that the calls were not protected activity under the Speech or Debate Clause.

*Proxmire* compels the conclusion that the Speech or Debate Clause protects none of the statements that Chastain challenges in his complaint. Sundquist's statements to the public, via press release and press conference, do not constitute legislative activity and therefore do not fall within the scope of the Speech or Debate Clause. Similarly, Sundquist's letters to the Attorney General and the Legal Services Corporation are not shielded by the Clause. These letters did not seek information or otherwise attempt to aid a congressional investigation. Rather, they attempted to influence the conduct of fed-

eral agencies—an activity that *Proxmire* holds the Speech or Debate Clause does not protect. As the challenged statements are not protected by the Clause, we turn to consider whether the judicially created doctrine of official immunity should be extended by this court to members of Congress.

B. *Official Immunity*

Numerous Supreme Court decisions describe the framework governing immunity from damage suit by various federal and state officials. The Constitution affords absolute immunity to the President from civil damage actions challenging his official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749-56 (1982), and members of Congress for "purely legislative activities" covered by the Speech or Debate Clause. *United States v. Brewster*, 408 U.S. at 512. Beyond that, the Court has fashioned an extra-constitutional body of immunity law to supplement the grants of immunity contained in the Constitution. *See Butz v. Economou*, 438 U.S. 478, 501-02 (1978) ("It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making.'" (quoting *Barr*, 360 U.S. at 569)). The Court has sought to tailor the minimum immunity required to permit the effective discharge of an official's responsibilities. Relying on common law precedent, the Court long ago extended absolute immunity to judges, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), and other officials who exercise "quasi-judicial" authority, including prosecutors, *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927), and grand jurors, *see Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976). The immunity was made absolute because of the predictable prospect that individuals subject to a judge, prosecutor, or grand juror's unfavorable decision would bring suit and no lesser protection would suffice.

It has taken the Court longer to work out the contours of immunity for executive officials. Because executive officials, the President aside, have no constitutional immunity from suit, the Court has struggled to devise an appropriate scheme to deal with officials of different rank and obligations defending against common law, statutory, and constitutional tort suits. The present scheme is perhaps easier to describe than explain.

For most executive officials, the immunity from all suits alleging constitutional and statutory violations is limited to a qualified defense whereby officials are held answerable only if they violate "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). *See Butz v. Economou*, 438 U.S. 478 (1978) (qualified immunity for high-ranking federal officials); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (parallel protection for state officials).

For a limited subset of officials when defending against actions for damages (the President, prosecutors, and those executives "engaged in adjudicative functions," *Harlow v. Fitzgerald*, 457 U.S. at 807), and for executive officials generally when defending against common law tort suits, the privilege is absolute, meaning the officials have a complete defense entitling them to summary judgment, subject only to the requirement that their actions fall within the outer perimeter of their official duties. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896).

Although this case represents an effort to extend the reach of official immunity to members of Congress, to date the protection afforded by the Speech or Debate Clause has been seen as sufficient to protect the func-

tional obligations of elected representatives. We read the precedents to go further and state that members of Congress expressly cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause. As to constitutional and statutory torts, however, this circuit has concluded that members of Congress are entitled to the qualified immunity protection described in *Harlow*. *McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985). This holding is not directly at issue, however, because we reject appellant's belated effort on appeal to allege constitutional and statutory violations. Brief for Appellant at 24 n.*. The complaint plainly alleges defamation and no more. App. at 1-11. As there also is no doubt that appellee's action—commenting on the operation of MALS, a government-funded o[illegible]ration—falls within the scope of his official duties, we do not address this particular issue further. Therefore, the sole question is whether appellee is entitled to judicially created official immunity against common law torts committed in the course of his official duties.

1. Supreme Court Precedent

Despite the absence of a holding directly on point, the Supreme Court in two modern cases expressly supports the principle of congressional liability for defamation arising outside the ambit of the Speech or Debate Clause. *Proxmire*, 443 U.S. at 123-33; *McMillan*, 412 U.S. at 311-25.

Petitioners in *McMillan* brought suit against the Superintendent of Documents and the Public Printer, among others, for publishing disparaging statements about individual students named in a congressional report assessing the District of Columbia schools. In response to defendants' assertions of immunity, the Supreme Court reversed the appellate court and expressly refused to extend *Barr*-type immunity. The Court did so precisely be-

cause it would not so protect a member of Congress or legislative aide who attacks a "person's good name, reputation, honor, or integrity." *McMillan*, 412 U.S. at 324 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)):

> We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski v. Eastland*, 387 U.S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. *The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity,"* Tenney v. Brandhove, 341 U.S., at 376, *they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.*

*Id.* (emphasis added).

Thus, the Court rejects, in the plainest language, the proposition that members of Congress are entitled to immunity from libel actions. The statement is especially striking because the Court in *McMillan* refused to apply the immunity even though the respondents acted within the scope of their official duty and petitioners sought damages for a common law tort. At best, one could attempt to avoid the import of this passage by claiming that it is formally dicta as no congressional defendants were referred to directly. The clarity of the Court's language, as well as its explicit placement in a discussion of *Barr*-type immunity from a libel action, makes this reading implausible.

*McMillan* also confirms the pivotal point that the question of congressional common law immunity for libel

cannot be considered independently of the Speech or Debate Clause: "The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same." *Id.* Pursuant to this line of reasoning, the Court stated:

> A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process "by which Members participate in committee and House proceedings."

*Id.* at 314-15 (footnote and citation omitted).

In *Proxmire*, a scientific researcher conducting experiments funded by the government brought a libel suit against Senator Proxmire upon publication to the press of his "Golden Fleece Award" attacking Hutchinson's work as a gross waste of taxpayer monies. The Court rejected Proxmire's contention that the publication fell within the protection of the Speech or Debate Clause and further rejected the claim that Hutchinson was a public figure. The Court ordered on remand that Proxmire answer for his alleged libel.

The compelling fact of *Proxmire* is that it involved a tort action against a senator for defamation via publication outside Congress, yet the Supreme Court did not announce a doctrine of absolute immunity. On the contrary, the Court again embraced the common law rule of liability for congressional libel, expressly repeating that, " '[a] Member of Congress may not with impunity publish a libel from the speaker's stand in his home district . . . .' " *Proxmire*, 443 U.S. at 130 (quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973)). Equally conclusive, the Court found that "the precedents abundantly support the con-

clusion that *a Member may be held liable for republishing defamatory statements originally made in either House*," *id.* at 127-28 (emphasis added).

It is also striking that the Court in *Proxmire* broke its rule against reaching constitutional questions when "a dispositive nonconstitutional ground is available," *Proxmire*, 443 U.S. at 122 (i.e., the case could have been remanded for appellate review of state law issues). If members of Congress in fact enjoy absolute immunity, the Court should instead have avoided the Speech or Debate and First Amendment discussion in its entirety by invoking *Barr*-type immunity. The failure of Senator Proxmire and his counsel to raise an immunity defense cannot explain the Supreme Court's oversight unless one is prepared to credit the Court with a unique willingness to reach for constitutional issues. Nor does it seem plausible that a case can be litigated all the way to the Supreme Court without anyone taking notice of a winning defense. Notwithstanding its evident constitutional overtones, official immunity, as opposed to constitutional Speech or Debate immunity, is a doctrine of judicial creation. *Barr*, 360 U.S. at 569; *McMillan*, 412 U.S. at 323. It has been implemented by the Court for reasons of policy and not in answer to a party's claim of a legal right.

A more plausible explanation is that the Supreme Court in *Proxmire* perceived no need to address, let alone adopt, a blanket protection against libel suits for members of Congress. As the Court never conceived that elected representatives could invoke judicially created official immunity, the opinion needed to address Speech or Debate immunity only, and having done so, it moved on.

The Court underscored this understanding in *Harlow*, 457 U.S. at 811: "In *Gravel*, . . . we emphasized that Senators and their aides were absolutely immune only when performing 'acts legislative in nature,' and not when taking other acts even 'in their official capacity.'" (citation omitted). Appellee argues, nevertheless, that the Supreme Court's holding in *Harlow* applies here to

prohibit Chastain's damage action against a member of Congress. In particular, appellee asserts that common law tort suits must be dismissed at the summary judgment stage because the alleged defamation violates no clearly established statute or constitutional provision. *See* Brief for Appellee at 19. We do not read *Harlow* to hold that anyone entitled to qualified immunity for constitutional and statutory torts is *ipso facto* entitled to absolute immunity for common law torts.

In this circuit we have construed *Harlow* to approve *Barr*-type absolute immunity for *common law torts*. *McKinney v. Whitfield*, 736 F.2d 766, 768 (D.C. Cir. 1984) (citing *Harlow* as "signalling that *Barr* remains good law."). *Independently*, the Court articulated a standard of qualified immunity for federal officials charged with *statutory and constitutional* violations. We reject appellee's reading of *Harlow* as collapsing the two standards. *See Metropolitan Police Dep't*, 812 F.2d 1425, 1431 (D.C. Cir.), *en banc order vacated and rehearing en banc denied*, 817 F.2d 144 (July 31, 1987) (The court addresses "common law tort claims under an 'absolute immunity' rubric, and . . . constitutional [and statutory] tort claims under a 'qualified immunity' headline. If the double standard is problematic . . ., it is nonetheless the framework High Court precedent currently delineates." *Id.*); *see also* Appellee's Memorandum on Motion to Dismiss at 17-18, *Chastain v. Sundquist* (D.D.C. Jan. 31, 1986) (No. 85-4037), App. at 39-40 ("The Plaintiff has alleged no constitutional or statutory violations. Had he done so, a different case would be presented and a *Harlow* analysis would be necessary. Since only the common law tort of defamation is alleged, however, Congressman Sundquist is absolutely immune and the case must be dismissed.").

The dissent cites a footnote in the *McMillan* opinion as suggestive authority for the extension of immunity. *See McMillan*, 412 U.S. at 319 n.13 ("Both before and after *Barr*, official immunity has been held applicable to officials

of the Legislative Branch. See *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland* [387 U.S. 82 (1967)]."").

We reject the argument that the *McMillan* footnote signals the availability of absolute or qualified tort immunity. The passage in *McMillan* stating that members of Congress are accountable for libelous statements made outside the scope of their legislative duties, *see supra* at 11, expressly relies on the same two authorities, *Tenney* and *Dombrowski*. The Supreme Court does not contradict itself within the space of six pages.

The footnote's meaning becomes apparent when one examines the references to *Tenney* and *Dombrowski*. The sentence refers to "officials of the Legislative Branch," highlighting, it would seem, a distinction between members of Congress and their aides. This distinction formed the basis for dismissing the suit in *Dombrowski* against Senator Eastland, but not against the counsel to a Senate subcommittee, for acts essentially within the protection of the Speech or Debate Clause:

> It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, that legislators engaged "in the sphere of legitimate legislative activity," . . ., should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves.

387 U.S. at 84-85 (internal citations omitted); *see also Eastland*, 421 U.S. at 507 (comparing derivative immune status of chief counsel in *Eastland* versus non-immune status of chief counsel in *Dombrowski*).

In *Tenney*, the Court rejected the proposition that the Reconstruction Congress, in exposing state officials to

damage suits without express limitation, therefore meant to abrogate the equivalent to federal Speech or Debate immunity traditionally enjoyed by state legislators. *Tenney*, 341 U.S. at 376. Official immunity, in this context, clearly referred to investigative acts by a state committee acting within its legislative core. In short, the footnote cited by the dissent speaks only of two cases involving activities in essence covered by the Speech or Debate Clause, but arising in a sufficiently oblique circumstance as to preclude direct application of the constitutional provision.

2. Considerations of Policy

*McMillan* and *Proxmire* indicate substantial Supreme Court support for appellant Chastain's position. It remains to be seen whether compelling considerations of policy, in the light of the contemporary demands made on members of Congress, undermine the apparent clarity of the Supreme Court's position. This requires a three-step inquiry. First, as we are dealing with judicially created immunity whose foundation resides in the common law, its teachings and reasoning must be consulted. *See, e.g., Butz*, 438 U.S. at 508 ("In each case [analyzing official immunity], we have undertaken 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" (quoting *Imbler v. Pachtman*, 424 U.S. at 421)). Second, the arguments in *Barr* in favor of executive immunity must be examined to see if they warrant a parallel extension to members of Congress. Finally, the constitutional context of the Speech or Debate Clause must be examined with care lest an expansion or unique grant of privilege upset part of the Constitution's carefully crafted design.

a. *The Common Law*

Dating back to 1688, the English Bill of Rights provided "[t]hat the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or

questioned in any court or place out of Parlyament." 1 W. & M., 2d sess., c. 2 (1688), *reprinted in* 10 *Halsbury's Statutes* 44, 46 (4th ed. 1985). With slight variation, that provision has been incorporated in the Constitution as the Speech or Debate Clause. Art. I, § 6, cl. 1. *See Eastland*, 421 U.S. at 502 (Clause is "a product of the English experience," but "English history does not totally define [its] reach . . . ."). Under the common law, a legislator's liability for defamation and other torts coexisted with, and depended upon, the guarantee of this absolute freedom of speech and debate within the legislature. The liability and the immunity are complementary aspects of representative government as it was intended to operate in this country as well as in England.

In *The King v. Creevey*, 105 Eng. Rep. 102 (K. B. 1813), a member of Parliament delivered a speech in the House of Commons accusing the Inspector General of Taxes, Robert Kirkpatrick, of a scheme for underassessing property values in return for "a great annuity." After several newspapers reported an incorrect version of the speech, the defendant sent a paper in Liverpool a correct report and requested that it be published, which was done. Kirkpatrick thereupon brought a libel charge against Creevey for the publication of the report, as opposed to the initial speech in the House.

The facts in *Creevey* parallel with precision the complaint of libelous publication made here by appellant. Both cases charge a legislator with common law libel for publication to the press of statements falling within the scope of official conduct. Both sought damages. Indeed, this case, if anything, presents a less equivocal claim in that the letter published to the press independently set forth the accusation of misconduct; it did not simply replicate a speech made in Congress.

The King's Bench rejected Creevey's immunity defense in terms as conclusive as one reads in the law. Chief Judge Lord Ellenborough, speaking first, put the issue plainly:

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> A member of [the House of Commons] has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there; but unauthorized by the House, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. . . . Has he a right to reiterate these reflections to the public; and to address them as an oratio ad populum in order to explain his conduct to his constituents? *There is no case in practice, nor I believe any proposition laid down by the best text writers upon the subject, that tends to such a conclusion.*

*Id.* at 104 (emphasis added).

The remaining members of the court confirmed this statement of the common law. *See id.* at 105 ("[E]very member ha[s] privilege of speech in Parliament: *but when he publishe[s] his speech to the world, it then [becomes] the subject of common law jurisdiction . . . .*" (Le Blanc, J.) (emphasis added)).

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The case of *The King v. Lord Abingdon*, 170 Eng. Rep. 337 (N. P. 1794), cited as controlling in *Creevey* by Judge Grose, states the principle with similar assurance and simplicity. Hence there can be no doubt that under English common law, a member of Parliament would necessarily be "the subject of common law jurisdiction" and made to answer for his allegedly libelous publication to the press. As these cases make clear, it was considered the essence of good government that elected representatives answer for their publications made to the world which "[throw] out reflections injurious to the character of an individual."

The English principle crossed the seas intact to America. Justice Story, citing to *Creevey* and *Lord Abingdon*, confirms the transplant:

> [T]he same principles seem applicable to the privilege of debate and speech in Congress. No man ought to have the right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled, through the medium of the press, to destroy the reputation and invade the repose of other citizens. It is neither within the scope of his duty nor in furtherance of public rights or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal and false charges and defamatory imputations, as a member of Congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweening self-conceit of a member of Congress.

1 J. Story, *Commentaries on the Constitution* § 866 at 631-32 (5th ed. 1905) (footnote omitted). Contemporaneous case law supports Story's assessment of legislative exposure to common law libel, *see Coffin v. Coffin*, 4 Mass. 1 (1803), as does Jefferson and Madison's joint remark that in forming a national government, "*the laws and principles remained unaltered which privileged the representative functions*, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, Executive and Judiciary . . . ." T. Jefferson (and J. Madison), Protest to the Virginia House of Delegates (1793), *reprinted in* 2 *The Founders' Constitution* 336 (P. Kurland & R. Lerner ed. 1987) (emphasis added).

Still, it might be objected, conditions have changed sufficiently since 1833 to require modification or, as here, outright reversal, of the common law principle subjecting elected representatives to libel suits. This objection is conclusively defeated in *Proxmire*, where the Supreme Court cites, in an extended discussion, *Creevey*, *Lord Abingdon*, Story, related sources, and prior Court prece-

dent with *unequivocal approval*. 443 U.S. at 128-30. It is implausible that the Court relied on this authority to limit the reach of the Speech or Debate Clause, yet meant at the same time to reject this authority if invoked under the rubric of official immunity.

The common law also provides a sufficient answer to the dissent's key assumption that legislators should be treated no differently than other official actors. As noted in *Lord Abingdon* and continuously thereafter, the distinctive obligations imposed on legislators require absolute immunity to make law, but privileges extending beyond that threaten the essential obligation to represent the people. By contrast, common law absolute immunity has always extended to those categories of officials who must face daily enforcement decisions. Put another way, the judicially created immunities for judges, prosecutors and executive officials confirm, rather than reverse, common law presumptions.

The absolute immunity granted a judge "for acts within his jurisdiction has roots extending to the earliest days of the common law." *Imbler v. Pachtman*, 424 U.S. at 423 n.20 (citation omitted). *See also Bradley v. Fisher*, 80 U.S. (13 Wall.) at 353 (1872) (citing, among others, Lord Ellenborough, the Chief Judge in *Creevey*, for the proposition that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction"); *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978) (approving reasoning of *Bradley*). By common law reasoning, the reach of absolute immunity was extended without difficulty to grand jurors and prosecutors. None of the three could reasonably be expected to perform their duties if threatened with personal liability by aggrieved parties. *See, e.g., Imbler*, 424 U.S. at 422-23 ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." (foot-

note omitted)); *Yaselli v. Goff*, 275 U.S. 503 (1927) (prosecutorial immunity).

The Court built on this tradition to extend the protection of absolute immunity to high-ranking executive officials—originally the Postmaster General. *Spalding v. Vilas*, 161 U.S. 483, 493-98 (1896). The case cites extensively to English and American case law upholding the absolute immunity of judges and superior army officers, and concludes:

> We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

*Id.* at 498.

The legal theory presented in *Barr* closely tracks the reasoning of *Spalding*, even while the outcome sanctions a greatly broadened scope of immunized activity. In its brief opinion, the plurality declares that immunity cannot for good reason be restricted to superior officials, but must by logic extend down the chain of authority to "officers of lower rank in the executive hierarchy." *Barr*, 360 U.S. at 573. The *Barr* decision explicitly takes account of all the known immunities, including the official

immunity conferred on legislators by the Speech or Debate Clause. *Id.* at 569-70.

In short, the historical record reveals an explicit, previously unquestioned rule of liability for a legislator's published libel on the one hand, and immunity for executive officials, judges, prosecutors, and grand jurors on the other. The accumulated wisdom accounting for this differentiation counsels against the grant of immunity sought by appellee. The common law commands respect not because it is old, but because it recognizes the need to limit rigorously the privileges available to the representatives of the people. This insight is not growing obsolete, and, as discussed below, it is unaffected by the modern day explosion in executive branch discretionary authority.

b. Barr *Rationale Does Not Extend to Members of Congress*

In *Barr* the Supreme Court recognized an individual's legitimate right to seek redress for "damage caused by oppressive or malicious action on the part of officials of the Federal Government." *Barr*, 360 U.S. at 565. Nonetheless, the plurality concluded that the threat of potential liability would place an excessive burden on the discharge of executive discretionary duties. *Id.* at 572-73. The Court has repeated this concern elsewhere. "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . [public officials] in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cited in Harlow*, 457 U.S. at 814; *Nixon*, 457 U.S. at 752 n.32; *see also Scheuer v. Rhodes*, 416 U.S. at 239-42; *Butz v. Economou*, 438 U.S. at 504-07.

At the same time, the Supreme Court has also made it clear that judicially created immunity should not be

granted unless justified by the function served by the relevant official. *Harlow*, 457 U.S. at 810; *McMillan*, 412 U.S. at 319-20. The nub of the argument sketched by the district court and fleshed out by the dissent is that members of Congress deserve in identical measure, and for the same reasons, the absolute common law tort immunity extended to executive officials. App. at 106; Dissent at 6-7. Although the Court, backed by an extensive common law tradition, would seem to have already concluded that the function of lawmaking does not require official immunity, we address this argument with care.

The privilege of official immunity, technically a defense, would protect elected representatives when and if they should libel private citizens in the pursuit of nonlegislative activities, such as lobbying, answering constituent mail, speaking to the press, raising funds, running for reelection, or responding to the myriad other obligations pressing on elected representatives today. The protection is claimed to be essential to the functioning of good government and ceases only if the representative engages in an act outside the scope of his official authority. In the words of the dissent, "[t]he balance courts have struck in other contexts is the balance I would strike in this case; there is no reason to strike another." Dissent at 10 (citing Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) ("the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.")). Application of this reasoning to members of Congress misfires on grounds that turn ultimately on the conception of representative government established by the Constitution.

Members of Congress have responsibility for making the laws, whereas executive officials must enforce the laws enacted by Congress, and do so in a manner that demands

the exercise of enforcement discretion. It is this fundamental *functional* distinction between the obligations of the legislative and executive branches of government that has resulted in the extension of judicially created immunities to the latter. As explained by the plurality in *Barr*, when Congress exercises its power to enact binding law, it places the executive official at risk of suit, like it or not. The need to exercise discretion when enforcing the law justifies the extraordinary remedy of absolute immunity from common law torts. Otherwise, only the foolhardy or excessively courageous executive official could be counted on to select the course, regardless of the personal consequence, that will in his judgment best achieve the congressional will. *Barr*, 360 U.S. at 571-72; *Scheuer v. Rhodes*, 416 U.S. at 239-40.

By sharpest contrast, Congress initiates lawmaking activity, an exercise in the art of declaring the general law that will govern the nation. As a general matter, no authority can compel it to act or control the direction of its lawmaking action once engaged, absent a violation of the Constitution. In this respect, members of Congress enjoy a freedom of action vis-à-vis a coordinate branch not shared by executive officials. At the same time, however, it was wholly evident to the Framers that this freedom did not of itself provide the sufficient safeguard to protect the essential functioning of the Congress from interference by the executive or the judiciary; hence the inclusion of the Speech or Debate Clause. *United States v. Johnson*, 383 U.S. 169, 177-80 (1966); *Gravel*, 408 U.S. at 617.

Within this framework, the precise duties of good government can be weighed, as set forth by Learned Hand in *Gregoire* and adopted by the Supreme Court. Congressman Sundquist has every right to monitor and challenge the manner in which the Legal Services Corporation operates. Within the halls of Congress, he can

lobby for its overhaul, engage in oversight hearings, and, should he choose, libel with impunity the reputation and integrity of any lawyer working for the Corporation. When he ventures beyond the protection of his Chamber, he can go to the hustings and loudly proclaim the law's failure. He can use the franking privilege to seek out his constituents' views or promote his own. He can use the issue as a *cause célèbre* to raise funds from like-minded political action committees. He can stand before the press and announce his views. In short, he can attack or defend, as he sees fit, the necessity of a public legal services corporation in general or the manner in which it operates in his own district. No barrier limits his sphere of operation to the confines of the House.

By the same token, no imperative of office requires that a member of Congress, *while acting outside the scope of his legislative duties*, be free to reach out with impunity and name names without regard for the consequence to individual reputations. *McMillan*, 412 U.S. at 314 ("We do not doubt the importance of informing the public about the business of Congress. . . . [But a] Member of Congress may not with impunity publish a libel from the speaker's stand in his home district . . . ."). These activities (the dissent notwithstanding) simply do not rise to the level of "constitutional responsibilities," Dissent at 1, that warrant the extension of official immunity to the legislative branch. Nor can it be reasonably postulated that the responsibilities of lawmaking in our constitutional system require a member of Congress to grant or deny privileges in a specific case, impose sentence, bring a prosecution, or apply general law to particular facts or take such other actions that will with predictable regularity expose members of the executive branch to the threat of suit. On those rare occasions when legislative duties require a representative or senator to make specific charges (as in the course of investigative hearings), he can do so under the shelter of the Speech or Debate Clause.

Judge Hand's balance thus weighs in clearly opposite directions for legislators and executives. Executive action at its core would be threatened, and regularly so, without common law tort immunity. Law cannot be enforced in the abstract. Specific persons in specific ways benefit and lose the instant an executive official chooses the manner in which to implement the law. The threat of suit from aggrieved persons constitutes a daily, omnipresent, inescapable threat.

Because of their vastly different obligations, legislators infrequently trench directly on the particular rights of named individuals. The reported cases in which they have been alleged to do so are rare and almost always present unique considerations. For example, in *Davis v. Passman*, 442 U.S. 228 (1979), a female employee of Congressman Passman claimed she was dismissed in favor of a less qualified male, thus violating her Fifth Amendment rights. The case provoked no dramatic concern that such suits threaten to paralyze Congress. In fact, the Court, far from avoiding the suit, expressly authorized a cause of action for damages directly under the Constitution. *Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This relatively narrow set of suits does not overwhelm the countervailing, deeply held interest in a responsive and responsible legislature.

In fact, the present record is unburdened by evidence to support a claim that members of Congress "who try to do their duty, [live in] constant dread of retaliation," thereby justifying a reversal of the common law. At a minimum, one would think a chorus of comments from the *Congressional Record* could be produced to document at least the perception of a threat, whether real or imagined—unless the dangers so evident to the dissent have to date escaped the attention of the very persons at risk.

Nonetheless, the dissent argues that because a member of Congress is engaged in a host of nonlegislative duties

in order to better serve his constituents, he must be granted extraordinary protections against his constituents—and all in the name of good government. Among the many problems with this position is that of distinguishing between congressional activity undertaken to further a constituent's interests and that undertaken to further the member's interest in reelection. The line between the two can be as fine as the line that separates privilege from license; and it takes little imagination to see the ease with which, in the heat of political contest, an immunity from suit for common law libel becomes a license to libel. It is precisely this danger, among others, that gave rise to the common law distinction between speech within the legislative chamber and speech outside it; and nothing has occurred since that precept was given constitutional status in the Speech or Debate Clause to diminish its wisdom.

c. *Constitutional Privileges*

The proposal to shield members of Congress from libel suits implicates the Speech or Debate Clause. *McMillan*, 412 U.S. at 324. This is so even though the publication of the Sundquist letter falls squarely outside the constitutional protection. The Speech or Debate Clause ensures that members of Congress can carry out their constitutional obligations:

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

J. Wilson, Legislative Department, Lectures on Law (1791), *reprinted in* 2 *The Founders' Constitution* at 331; *Johnson*, 383 U.S. at 179 (clause "protect[s] against possible prosecution by an unfriendly executive and con-

viction by a hostile judiciary . . . [to] ensur[e] the independence of the legislature"). Beyond that, "good government" demands that elected representatives remain wholly answerable to any person whom they choose to libel or who claims to have been libeled. *McMillan*, 412 U.S. at 320 (" '[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.' " (quoting *Tenney v. Brandhove*, 341 U.S. at 377 (brackets original))). Far from threatening government, this public accountability constitutes an essential feature of good government.

The Framers looked to the Speech or Debate Clause as written, and in the context of the broader operation of the Constitution, to assure the "discharge [of the] publick trust with firmness and success." In a display of dramatically reduced confidence, appellee would reject the sufficiency of the constitutional schema and in effect rewrite the clause to read that senators and representatives shall be privileged from questioning in any other place "for any Speech or Debate in either House *or anywhere in respect of common law torts.*"

This expansion of the privilege contravenes Supreme Court direction and constitutional purpose:

> The authors of our Constitution were well aware of the history of both the need for the privilege *and the abuses that could flow from too sweeping safeguards.* In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, *but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.*

*Proxmire*, 443 U.S. at 127 (quoting *Brewster*, 408 U.S. at 517 (1972)) (emphasis added in *Proxmire*).

Moreover, members of Congress receive other unique privileges to assure the ultimate goal of a representative

government. For example, Jefferson and Madison, writing jointly, emphasize the central significance of the franking privilege and the privilege against arrest afforded representatives when traveling to and from Congress:

> That in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

T. Jefferson (and J. Madison), Protest to the Virginia House of Delegates (1793), *reprinted in* 2 *The Founders' Constitution* at 336.

They also mention in this same vein the freedom from arrest, *id.*, while Madison and others speak elsewhere of the need to compensate representatives from the federal, rather than state, treasury to ensure congressional independence. This latter innovation occasioned far and away the most debate among the provisions of Article I, clause 6 by the Framers and Ratifiers. *See* 2 *The Founders' Constitution* at 323-29 (quoting Madison's records of the debates in drafting the Constitution).

In short, the constitutional text speaks in specific terms, and in the very fabric of its design, to the precise con-

cern that representative government fulfill the high ideals envisioned by the Framers. Yet notwithstanding the evident success of the design and despite the abundance of features thought sufficient by the Framers, the dissent would add a novel judicial protection without any evidence of its need, and do so at the risk of undermining the "good government" it so earnestly seeks.

3. Circuit Court Precedent

The dissent argues that the present case is controlled by two circuit cases, *McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985), and *Walker v. Jones*, 733 F.2d 923, 932-33 (D.C. Cir.), *cert. denied*, 469 U.S. 1063 (1984), and that we "brush[] aside clear precedent," Dissent at 1, although, in the next breath, the dissent admits that "[i]n neither of the prior cases did we reach the issue of what kind of immunity members of Congress have from suits charging violations of the common law, because the suits at issue did not involve such claims." Dissent at 9.

*Walker* is perhaps the oddest of the references in that the *Walker* court expressly holds that "the Supreme Court has instructed that absolute immunity for members of Congress *does not extend* beyond the scope of the Speech or Debate Clause." *Walker*, 733 F.2d at 932 (emphasis added). Yet the dissent says the case "compel[s]" the result here, namely that absolute immunity *does extend* beyond the Speech or Debate Clause. Dissent at 1. This is patently untenable.

The balance of the *Walker* court's brief immunity discussion stems from an apparently uncontested assumption that members of Congress may assert *Harlow* immunity with respect to statutory and constitutional torts. Judge MacKinnon in dissent called attention to the "puzzling" quality of this dictum. *Id.* at 937 n.7 ("In light of the Supreme Court's ruling that Speech or Debate immunity constitutes the *sole* separation-of-powers barrier to adjudication of such cases, the majority's indication that

qualified official immunity might shield defendants from liability in this case is puzzling." (emphasis original)) (MacKinnon, J., dissenting). One can extract at most a tentative indication from the unexplored assumption in *Walker*; surely no blanket grant of immunity from common law suits follows from these terse references to qualified constitutional and statutory immunity added at the end of the *Walker* opinion. We are all the more convinced that *Walker* does not constrain our full examination of the issue here by the conclusion of the two-paragraph discussion in that case: "The blank record and misdirected argument now before us, in short, supply no justification for dismissing this action on a qualified immunity ground." *Id.* at 933 (footnote omitted).

The "precedent" for the grant of immunity from common law torts thus whittles down to a two-page discussion in *McSurely* extending qualified immunity for a constitutional tort to a senator and his counsel accused of participating in an unconstitutional seizure of private papers, and to the congressional aide who in fact executed the inspection and transportation of the documents in question. As noted, the jurisprudence analyzing statutory and constitutional torts stands distinct from that applied to common law torts. *See supra* at 9-10. Hence, at best, *McSurely* constitutes a fulcrum, as opposed to precedent, for asserting a parallel grant of absolute immunity. The argument is not compelling on several counts.

First, as with *Walker*, the *McSurely* court essentially assumes without discussion that qualified immunity, granted to executive officials in *Harlow*, properly and necessarily extends to members of Congress. We have no warrant in this case to directly address the validity of this assertion. Two comments, however, are appropriate. By extension of the arguments presented here, Speech or Debate immunity may avoid the need for qualified immunity from constitutional and statutory torts, as well as for immunity against common law torts. Alternatively, it may be that distinct treatment is warranted for common

law torts, whose elements are well established and hence have no need for absolute immunity, versus constitutional and statutory torts, where, as *Harlow* makes clear, the violations giving rise to liability may or may not be clearly established. It at least could be imagined that a member of Congress violating a law without adequate notice while pursuing nonlegislative duties requires qualified immunity, whereas there is no warrant for immunity from libel suits. This, however, is speculation properly raised in defense to a case involving a statutory or constitutional violation. As it is, a theory based in the first instance on an unexplored premise of congressional qualified immunity does not compel its extension to absolute immunity from defamation suits. Certainly the argument cannot be made in the name of controlling circuit precedent.

Second, arguments of consistency are always double-edged. Thus, it is worth noting that even as to executive officials, this court and others have questioned whether the goal of vigorous executive enforcement might be better served by qualified rather than absolute immunity. *See Martin*, 812 F.2d at 1428 n.11. Then-Justice Rehnquist, partially dissenting in *Butz v. Economou*, 438 U.S. at 517, took the opposite tack and argued for the extension of absolute immunity for constitutional and statutory tort violations by high-ranking federal executive officials. *Id.* at 529-30 (Rehnquist, J., concurring in part, dissenting in part). Judge Mikva would decide against both these arguments as applied to members of Congress, on facts not properly raising the issue, to justify its suggested holding.

Finally, the legal history of the *McSurely* litigation, which stretched over seventeen years, was sufficiently unusual and complex to cause the court itself to admit to a certain judicial exhaustion: "The legal world will little note nor long remember the fine lines that have been drawn in this opinion . . . . It will be enough if our

opinion finally ends this sorry chapter of investigative excess." 753 F.2d at 115. Thus *McSurely* does not seem the firmest rock on which to build a novel privilege.

4. Congressional Action

There is a final reason that extension of official immunity by this court is improper. Unlike members of the executive or judicial branches, members of Congress have the unique ability to enact legislation. In this capacity, congressional power could be hypothesized to exist to enact legislation immunizing members of Congress from common law torts. We have no occasion to judge whether such a power, if asserted, would pass constitutional muster. *Compare McMillan*, 412 U.S. at 323 (suggesting that Congress could immunize the government printers from damage suits). But the possibility of self-protection, subject to judicial review, makes the judicial rush into the breach all the more inappropriate. Separation of powers counsels as much against a grab of power committed to other branches as it does to extending protection to a branch that may well have the power to protect itself. If members of Congress in fact believe they require the protection of official immunity, let them so declare and stand accountable to the people for their action.

C. *Defamation and the First Amendment*

The Supreme Court has recently summarized the interplay of libel law and the First Amendment:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)], the Constitution still supplants the standards of the common law, but the

> constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*[, *Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)], the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

*Philadelphia Newspapers, Inc. v. Hepps*, —— U.S. ——, 106 S. Ct. 1558, 1563 (1986).

This issue is not before us. We simply note that the denial of immunity does not mean that members of Congress faced with defamation suits are necessarily limited to common law defenses. *See Butz*, 438 U.S. at 508 n.35 (noting, without deciding, that "[t]he defendant official may also be able to assert on summary judgment some other common-law or constitutional privilege."). As to the common law defenses, we underscore that when the Court stated that members of Congress are entitled to "no special immunity from local [defamation] laws," *McMillan*, 412 U.S. at 324, it is plain the Court also intended that representatives not be specially deprived of defenses. For example, there may be a qualified defamation defense for "communications from one public officer to another, in an effort to discharge an official duty . . ." that would apply to the letters written to the Attorney General and the official at the Legal Services Corporation. Prosser and Keeton on the Law of Torts § 115, at 830 (5th ed. 1984). Whatever the case, our holding does not preclude appellee on remand from asserting all available defenses recognized in the jurisdiction supplying the substantive law.

## III. Conclusion

The Speech or Debate Clause provides members of Congress with an immunity that is coextensive with their constitutional responsibilities. When they move beyond

the requirements of their legislative responsibilities, they do so as volunteers, and at their own risk, however important their myriad other activities may be in the texture of contemporary political life.

We cannot blind ourselves to the essential distinction between legislative duties imposed by the Constitution and those that may be voluntarily assumed. The work of of the legislative branch is to craft the general rules and policies that the other branches are called upon to apply to specific cases. There is nothing constitutionally required of a senator or representative that cannot be accomplished under the protection of constitutional immunity. It is this clear distinction between inherent and elective duties that disqualifies members of Congress for the grant of official immunity. Elected representatives, in the deepest sense, represent the people. Beyond the necessary privileges granted by the Constitution to legislators, the people ought not to be immunized against themselves.

As Madison warned, "it is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions." *The Federalist* No. 48, at 309 (J. Madison) (C. Rossiter ed. 1961). Congressman Madison again put the point eloquently in opposing a statutory proposal to exempt part-time representatives from military service during recess:

> Mr. Madison thought it an important principle, and one that ought in general to be attended to—That all laws should be made to operate as much on the law makers as upon the people; the greatest security for the preservation of liberty, is for the government to have a sympathy with those on whom the laws act, and a real participation and communication of all their burthens and grievances. Whenever it is necessary to exempt any part of the government from sharing in these common burthens, that necessity

> ought not only to be palpable, but should on no account be exceeded.

J. Madison, The Militia Bill, House of Representatives (Dec. 16, 1790), *reprinted in* 2 *The Founders' Constitution* at 331.

Madison's words sound as loudly today. The decision of the district court dismissing appellant's defamation action against Representative Sundquist is

*Reversed and remanded.*

MIKVA, *Circuit Judge*, dissenting: The court today brushes aside clear precedent of this Court to reach its holding restricting the scope of congressional immunity. Under today's decision, members of Congress are not accorded even the basic qualified immunity that has routinely been extended to all manner of executive employees acting within the sphere of their employment. In reaching this result, the majority ignores two recent decisions of this court, which explicitly extend official immunity to members of Congress and their staffs.

The court reaches this precedent-denigrating result by mechanically reading the Constitution as if it were a collection of mutually exclusive boxes: because the Congress is given a specific "Speech or Debate" immunity, it holds, Congressmen cannot also qualify for the immunity that courts have given to postmen. Today's holding not only ignores precedent, but does damage to our governmental structure. Without congressional immunity, we are liable to have a Congress that is deterred from the vigorous exercise of its constitutional responsibilities. As Judge Learned Hand wrote of the immunity doctrine generally, denying government officials its protection "would dampen the ardor of all but the most resolute . . . in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Because I believe that this Circuit's immunity doctrine precedent and sound public policy considerations compel a holding that Congressmen have qualified immunity from common law tort suits for actions within the sphere of their employment, I dissent from today's decision.

## I.

I agree with the majority that the Speech or Debate Clause does not shield Congressman Sundquist from the instant libel action. The statements at issue in this case were not made in the course of his legislative activities, and the majority is therefore correct in stating that the

Supreme Court's holding in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), dictates that the Speech or Debate Clause does not protect them. However, the functions of a Congressman are more than legislative. The efforts of the defendant to call attention to what he considered to be problems within a legal services office were part of his job, and the comments at issue in this case were a part of that effort. As this court has made clear in two recent cases, the defendant's statements should be protected by the doctrine of limited official immunity.

As the majority notes, the Constitution confers immunity on governmental officials only sparingly. The Speech or Debate Clause, as interpreted by the Supreme Court, protects Senators and Representatives from all actions challenging strictly legislative activities. In addition, the provisions of Article II, as read broadly by the Court, protect the President from civil damages actions challenging his official acts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749-56 (1982). The Constitution itself confers no further immunity on governmental officials. In essence, the constitutional scheme, taken alone, allows persons to bring suit against numerous Government officials performing numerous public functions.

However, the Supreme Court has long looked with disfavor on limiting the scope of official immunity to the constitutionality mandated floor. *See, e.g., Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871); *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896). The Court, of course, has recognized the interests counseling against the extension of official immunity; it has taken cognizance of the principle that officials should not occupy a place "above the law." *See Nixon*, 457 U.S. at 758 & n.41. More specifically, the Court has noted the value of allowing individual citizens a right to redress for "damage caused by oppressive or malicious action on the part of officials of the Federal Government." *Barr v. Matteo*, 360 U.S. 564, 565 (1959). But the Court has held repeatedly that

a competing value justifies granting governmental officials a measure of immunity above the constitutionally established minimum. *See, e.g., id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). This countervailing value is the value of good government. *See, e.g., Barr*, 360 U.S. at 572-73 ("The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government."). When a governmental official lives in fear of litigation stemming from his official acts, he will often fail to execute his office and perform his responsibilities with the vigor and decisiveness required by the public good. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); *Nixon*, 457 U.S. at 752 n.32. This consideration has led the Court to fashion an extra-constitutional body of immunity law to supplement the grants of immunity to governmental officials contained in the Constitution. It is this consideration that the majority ignores in today's decision.

Judicially created official immunity will never insulate a governmental official from all suits. In all contexts, judicially created immunity—unlike the immunity conferred by the Speech or Debate Clause—protects the official from nothing more than civil suits for monetary damages. *See Harlow*, 457 U.S. at 806. Moreover, the official immunity doctrine protects a governmental official only from civil damages suits arising out of acts within the scope of the official's authority. *See Nixon*, 457 U.S. at 755-56. These two unwavering principles impose a cap on the potential reach of the official immunity doctrine. Under "Speech or Debate" a Congressman's immunity has no such bounds. It is total. A Congressman under its protection may say whatever he wishes and be protected from civil or criminal liability, and even detention or mere questioning. The limited immunity being sought here, however, is of a different stripe.

Within this outer limit, the Supreme Court has, as the majority notes, afforded government officials different measures of immunity depending on the nature of the functions that the official performs. *See Harlow*, 457 U.S. at 810 ("[O]ur cases have followed a functional approach to immunity law."). The Court has held that certain kinds of functions are so "sensitive," *id.* at 746—*i.e.*, so necessary to the public good *and* so likely to provoke retaliatory litigation—that when an official performs them, he receives absolute immunity from civil damage suits, regardless of whether these suits charge a constitutional, statutory, or common law violation. *See Butz v. Economou*, 438 U.S. 478, 507, 512, 515 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976). The Supreme Court has decided that both judicial and prosecutorial functions are of this kind; thus, when governmental officials perform such functions, they are absolutely immune from liability for damages. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (judicial functions); *Imbler*, 424 U.S. at 427 (1976) (prosecutorial functions). Other official functions, however, require less protection. When officials perform these functions, they receive absolute immunity from damage actions charging common law violations, but only qualified immunity from actions charging constitutional or statutory torts. (Qualified immunity from suits of this kind protects officials insofar as their conduct does not violate clearly established constitutional or statutory norms. *See Harlow*, 457 U.S. at 818.) The Supreme Court has placed within this category of official functions prototypically executive tasks required or authorized by federal law. *See Butz*, 438 U.S. at 495, 507; *Barr*, 360 U.S. at 574. The Court has never granted any lesser degree of protection to a governmental official performing an act within his official sphere.

The majority relies for its holding on a stretching of Supreme Court precedent in the immunity area. First,

it relies heavily on *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), which declined to extend the Speech or Debate Clause to newsletters or press releases issued by a Senator. The majority reads too much into this case when it says it stands for the proposition that "the Court . . . embraced the common law rule of liability for congressional libel . . . ." Majority opinion at 12. The respondent in *Hutchinson* did not claim official immunity; he only claimed immunity under the Speech or Debate Clause. In limiting the application of Speech or Debate Clause immunity to matters within the legislative sphere, the Supreme Court has neither explicitly nor implicitly negated the application of judicially created official immunity to activities outside that sphere. Speech or Debate Clause immunity and judicially created official immunity offer distinctly different protections. The former grants members of Congress a testimonial privilege and protects them from all civil and criminal proceedings. The latter, in its strongest form, protects officials only from civil suits for damages. The lesson of the Supreme Court cases construing the Speech or Debate Clause is that members of Congress will not receive the blanket Speech or Debate Clause immunity when they act outside the legislative sphere. *Hutchinson* cannot be read to mean that members of Congress will receive *no* official immunity when they act outside that sphere. Thus, to recognize official immunity for members of Congress would not circumvent the Supreme Court's Speech or Debate Clause jurisprudence; rather, it would apply a distinct immunity doctrine in a manner perfectly consistent with the Court's Speech or Debate Clause cases.

The majority fails to pay sufficient attention to a second case primarily involving the Speech or Debate Clause, in which the Court rejected a lower court's decision to use that doctrine to insulate a Congressman acting in an official but non-legislative capacity from grand jury inquiry and possible criminal prosecution. *See Gravel v.*

*United States*, 408 U.S. 606 (1972). The Court based its decision solely on the rationale that the judicially fashioned doctrine of official immunity serves only as a shield from civil suits for damages. *See id.* Although we might read into this approach a willingness to apply the doctrine to members of Congress faced with civil damages suits, we cannot say with any assurance that the Supreme Court meant its analysis to bear this weight: the Court may well have meant to avoid the question that confronts the court today. In a footnote in a subsequent decision, the Court succinctly stated that the official immunity doctrine "has been held applicable to officials of the Legislative Branch." *Doe v. McMillan*, 412 U.S. 306, 319 n.13 (1973). This statement, taken on its face, supports Sundquist's position—indeed, decides this case. But the very brevity of this statement—and its location in a footnote—give some pause. Because it is impossible to discern the precise meaning the Court intended this statement to carry, it cannot be relied upon with great confidence. But it certainly belies the majority's odd assertion that the Court in *Doe* "rejects, in the plainest language, the proposition that members of Congress are entitled to immunity from libel actions." Majority opinion at 11. In sum, the Supreme Court so far has not discussed in any meaningful way the precise question before us; and it certainly has not closed the door to further examination of the question. The inquiry therefore must turn to the underlying purposes of the Court's official immunity doctrine and to this Circuit's prior interpretations of that doctrine.

II.

The majority is far too dismissive of the important policy considerations militating in favor of congressional official immunity. The purposes underlying the Supreme Court's development of the official immunity doctrine support application of the doctrine to members of Congress performing official functions outside the strictly

legislative sphere. The essential role of the official immunity doctrine is to encourage governmental personnel to perform their official responsibilities vigorously and capably by removing the fear of litigation that such performance might prompt. *See supra* at 3. This animating principle is as relevant to the performance of official, albeit non-legislative, functions by members of Congress as it is to the performance of official functions by other governmental officers. That members of Congress have such non-legislative official functions cannot reasonably be denied. The Supreme Court has noted their existence, *see Harlow*, 457 U.S. at 811; *Gravel*, 408 U.S. at 625, and in doing so, has done no more than recognize and articulate common knowledge. The majority underestimates the role of Congress when they conceive the Congressman's role as limited to "responsibility for making the laws." Majority opinion at 23. That is not the limit that the author of the opinion applied to his role as Congressman, nor that I did to my own. Members of Congress are our citizenry's primary representatives in the federal government, and the job of representation necessarily entails more than the consideration and enactment of legislation. Moreover, such official functions are of great significance in the workings of our government. In their role as representatives and ombudsmen, members of Congress perform a variety of non-legislative tasks that make this nation's government more responsive to its citizenry and that make this nation's citizenry more attentive to its government. These tasks are entitled to—but more important, these tasks *need*—no less protection than the tasks performed by the vast majority of other government officials in the exercise of their authority. The majority's approach of removing the protection for these functions discourages Congressmen from vigorous action in their non-legislative but official sphere and advances timidity or, worse yet, inaction in a range of governmental functions.

The question remains whether these principles counsel granting members of Congress the greater or the lesser kind of official immunity established by the Supreme Court. I do not believe that official activities of members of Congress outside the legislative core are of a nature as to require that members receive absolute immunity from all civil damages suits challenging official action, regardless of whether they charge a constitutional, statutory, or common law violation. The Court, as I have noted above, has indicated that such broad immunity should accompany only official functions whose exercise is exceptionally likely to prompt retaliatory litigation, such as prosecutorial and judicial functions. *See supra* at 4. The official functions of members of Congress outside the legislative core are not of this kind; they will not frequently provoke civil actions by angry or resentful persons. I would therefore hold that a member of Congress performing official but non-legislative functions is entitled to the kind of official immunity that the Supreme Court has held that government officials performing executive functions enjoy—absolute immunity from damage suits charging a violation of the common law, but only qualified immunity from damage suits charging a statutory or constitutional tort.

III.

Today's majority opinion marks a dramatic departure from this Circuit's previous holdings in this area. In two recent cases involving statutory and constitutional claims, we held that several members of Congress and their aides (who receive the same immunity as members themselves, *see Gravel*, 408 U.S. at 618) were entitled to avail themselves of the official immunity doctrine. *See McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir.) (per curiam), *cert. denied*, 106 S. Ct. 525 (1985); *Walker v. Jones*, 733 F.2d 923, 932-33 (D.C. Cir.), *cert. denied*, 105 S. Ct. 512 (1984). In each case, this court decided that the Speech or Debate Clause provided the congressional de-

fendants with no protection from suit because the challenged acts fell outside the legislative sphere. *See McSurely*, 753 F.2d at 95, 99; *Walker*, 733 F.2d at 932. The panels then went on to probe whether the judicially created doctrine of official immunity shielded the defendants, who were acting within the scope or their official authority. We concluded in each case that the congressional defendants had qualified immunity from the claims; the defendants, the court wrote, would prevail if they had not violated clearly established constitutional or statutory rights. *See McSurely*, 753 F.2d at 99-100; *Walker*, 733 F.2d at 932. In other words, the court in each case held that a member of Congress acting outside the legislative sphere but within the scope of his official authority has the same immunity from constitutional and statutory claims as does a governmental official performing executive functions. *See also Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 135 (5th Cir. 1986) (reaching the same conclusion with respect to state legislators, who the Supreme Court has held receive immunity comparable to that of members of Congress).

In neither of the prior cases did we reach the issue of what kind of immunity members of Congress have from suits charging violations of the common law, because the suits at issue did not involve such claims. But it would be odd to say that members of Congress performing non-legislative official functions have the same kind of immunity from suits charging statutory or constitutional torts as governmental officers performing executive functions, but have a lesser kind of immunity (or no immunity at all) from suits charging violations of the common law. Yet this is precisely the anomolous position in which the majority opinion leaves us. In stating that members of Congress performing non-legislative official functions have qualified immunity from suits charging constitutional or statutory torts, I would merely restate the holdings of two prior panels of this court. In stating that members of Congress performing such functions have

absolute immunity from suits charging common law torts, I would merely state the obvious and inevitable corollary of these prior holdings.

I realize that the immunity that I would accord to Congressmen is not without cost. Granting members of Congress a measure of official immunity would effectively foreclose a number of meritorious civil damage suits. Some genuinely aggrieved parties would find themselves unable to recover monetary damages for the wrongs that they have suffered. And because at times "it is damages or nothing[,]" *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring), some plaintiffs would be unable to gain any meaningful relief.

I do not deny these costs, and I do not make light of them. Congressmen certainly do not always act wisely or productively, but it is not the function of judges to make that sort of determination. Concededly, for the person aggrieved and in search of a remedy, it is small comfort to know that the judicially created doctrine of official immunity serves the public good. But in determining the proper application of the official immunity doctrine, I would factor in this countervailing value. As Judge Learned Hand once wrote, "the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrong done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire*, 177 F.2d at 581. The balance courts have struck in other contexts is the balance I would strike in this case; there is no reason to strike another. The commonweal requires vigorous official action by members of Congress no less than by other participants in government. And a measure of immunity is no less a prerequisite of such action in this context than in any other. I would therefore hold, notwithstanding an appreciation of this holding's costs, that

members of Congress, like other governmental officials, are entitled to avail themselves of the doctrine of official immunity.

Deciding the immunity issue would not alone decide this case. Even if Congressmen may have official immunity, Sundquist would have official immunity from this libel suit only if he acted within the scope of his official authority when he sent letters to the Attorney General and the Legal Services Corporation and made statements to the press. If Sundquist was acting beyond the realm of his official authority, he could lay no claim to official immunity; he would be liable to the same extent as any private individual.

I would find that all of the acts challenged by Chastain were within Sundquist's official sphere. The Supreme Court has stated in no uncertain terms that exhorting federal officials to take action with respect to governmental matters is activity within the scope of a congressional member's official authority. *See Gravel*, 408 U.S. at 625. Sundquist's exhortations to the Attorney General and the Legal Services Corporation to investigate MALS —a federally funded body that Sundquist claimed was obstructing the administration of federal legislation— therefore rank as official activity. I would reach the same conclusion with respect to Sundquist's statements to the press. In *Barr, supra*, the Supreme Court held that an executive official was acting within the scope of his official authority when he issued an allegedly libelous press release detailing his views on a matter of wide public interest. *See* 360 U.S. at 574-75. The Court in that case wrote:

> [W]e cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue. . . . [A] publicly expressed statement of the position of the agency head . . . was an appropriate exercise of the discretion which an officer of that rank must possess if the

> public service is to function effectively. It would be an unduly restrictive view of the scope of the duties of a policymaking executive official to hold that a public statement of agency policy in respect to matters of wide interest and concern is not action in the line of duty.

*Id.* Similarly, when a member of Congress makes statements to the press concerning his actions and policies with respect to a matter of interest and importance to his constituents, he acts within the scope of his official authority. Members of Congress, no less than executive officers, have both the authority and the responsibility to keep the public apprised of their activities and positions respecting such matters. Absent this authority and this responsibility, our government, which rests ultimately on an informed public opinion, could not so responsively or ably function. *See Barr*, 360 U.S. at 577 (Black, J., concurring) ("The effective functioning of a free government . . . calls for the widest possible understanding of the . . . service rendered by all elective or appointed public officials or employees."); W. Wilson, Congressional Government 303 (1885) ("It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . [U]nless Congress [does] these things . . . the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."). Because Sundquist's statements to the press involved a matter of concern and significance to his district—a matter relating directly to the functioning of government—they fell within the scope of his official authority. Sundquist should consequently be able to lay claim to official immunity.

The only remaining question is whether Sundquist would be entitled to absolute immunity or qualified immunity from Chastain's suit. As I have stated, Sundquist would have absolute immunity from a suit alleging a common law tort, but only qualified immunity from a suit

alleging a constitutional or statutory wrong. Chastain's complaint charges libel, and courts have held repeatedly that libel, even when committed by a governmental official, is nothing more than a common law tort. *See, e.g., Paul v. Davis*, 424 U.S. 693, 711-12 (1976). On appeal, however, Chastain argues that his complaint implicitly charges Sundquist with having violated both the First Amendment and certain statutory provisions relating to the Legal Services Corporation. Chastain therefore argued that he has alleged constitutional and statutory violation, from which Sundquist has only qualified immunity. This argument is unpersuasive; the complaint charges neither a constitutional nor a statutory tort. Chastain's complaint alleges only libel, which is a violation of the common law. I would therefore hold that Sundquist has absolute immunity from the suit.

## IV. Conclusion

In a free society, the power of elected officials is not absolute; it is cabined by the Constitution, by statute, and by common law. But not every transgression of the law by elected officials should give rise to civil liability. When an elected official violates the law in the course of performing functions essential to our government, the interests of private individuals in obtaining redress through monetary damages must sometimes yield to the interests of the broader public. I would therefore hold that members of Congress acting within the scope of their official authority have recourse to the doctrine of official immunity. In this non-legislative sphere, I would hold that members receive absolute immunity from suits alleging common law torts and qualified immunity from suits alleging statutory or constitutional violations. In writing to the Attorney General and a committee of the Legal Services Corporation about a matter of public interest and importance and in making statements about that matter to the press, I believe Sundquist acted within

the scope of his official authority. Because Chastain's complaint alleges only a violation of the common law, I believe Sundquist is absolutely immune from the suit. Therefore, I believe the district court acted appropriately in dismissing the complaint, and would affirm the court's decision. From the majority's complete rejection of any immunity for Congressman Sundquist,

*I dissent.*

APPENDIX B

# In the United States District Court

FOR THE DISTRICT OF COLUMBIA

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(Civil Action No. 85-4037)

WAYNE CHASTAIN, PLAINTIFF

*v.*

DONALD SUNDQUIST, DEFENDANT

*Washington, D.C., Wednesday, April 9, 1986*

The above-entitled case came on for a hearing on motion to remand and to dismiss before The Honorable CHARLES R. RICHEY, United States District Judge, at 2:25 p.m.

Appearances:

*Bernard Fensterwald, III,* Esq., for the Plaintiff.

*Steven R. Ross*, Esq., *Janina Jaruzelski*, Esq., and *Michael L. Murray*, Esq., for the defendant.

The Court. Well, Ma'am, we have here a motion to dismiss, which you filed on behalf of a Member of the House.

Ms. JARUZELSKI. Yes.

The COURT. Is it not the duty of the court to construe that complaint in connection with your motion to dismiss in the light most favorably toward the plaintiff?

Ms. JARUZELSKI. Yes, your honor. Although the Court has repeatedly stated that general principle should not be so interpreted as to allow insubstantial lawsuits against high public officials to proceed to trial.

The COURT. There are cases, certainly under the speech and debate clause, which say that.

Ms. JARUZELSKI. Harlow says it, too. Harlow repeats the admonition. In not one place, but about three different places, in fact, the court indicates——

The COURT. The circuit court said that. I quoted from it.

Mr. Fensterwald undoubtedly recalls I ruled on it in another case he had within the last week or 10 days.

Mr. FENSTERWALD. That's correct, Your Honor.

The COURT. I think that's correct. But here we have an allegation against a Congressman charging others with irregularities, possible obstruction of the law, which were contained in the original letters to the Attorney General and the Legal Services Corporation, if the Court remembers correctly.

Is that right so far?

Ms. JARUZELSKI. I think so.

The COURT. All right. Those same statements were repeated in the public press by the Congressman in Memphis, Tennessee.

Ms. JARUZELSKI. Right.

The COURT. Is that right?

Ms. JARUZELSKI. So far as we know.

The COURT. That's the allegation in the complaint.

Ms. JARUZELSKI. I think so.

The COURT. How do I know, under the standards that the Court must judge this, that those statements are within the outer perimeters of a Congressman's duty?

Ms. JARUZELSKI. Well, Your Honor, I think that you have——

The COURT. Maybe we can get a stipulation from Mr. Fensterwald that it is.

Come up here to the lectern with your colleague.

Is it a fact of life that any of us who are in this room recognize that Members of the House and Members of the Senate do make public statements to the media?

Mr. FENSTERWALD. Probably too many more than they should, Your Honor.

The COURT. Well, they make them all the time.

Mr. FENSTERWALD Yes, sir.

The COURT. In connection with their work as Members of either body, do they not, Members of the Congress?

Mr. FENSTERWALD. That's correct.

The COURT. Can we stipulate for purposes of this case that all the statements made by the Congressman here were made by him in connection with his duties as a Member of the Congress?

Mr. FENSTERWALD. Your Honor, I would be willing to stipulate that insofar as the statement was made to the Attorney General, it certainly was within his function as a Congressman to do that.

The COURT. The same would be true with respect to the statements that were contained in his letter to the official of the Legal Services Corporation.

Mr. FENSTERWALD. As to the letter that went to the Legal Services Corporation itself, yes. I would be willing to stipulate to that.

The COURT. How about his statement to the press? Did you allege that he made some statements to the press in Memphis?

Mr. FENSTERWALD. Yes, he did.

The COURT. Wouldn't that also be involving the same subject matter, be a part of his duties as a Congressman?

Mr. FENSTERWALD. Oh, I do.

The COURT. Not to harm your client.

Mr. FENSTERWALD. No. If I agreed with you a hundred percent, I wouldn't be standing here today. I would have agreed with the defendants.

The COURT. But, nevertheless, we both have a duty as lawyers and as judges——

Mr. FENSTERWALD. I understand that.

The COURT. To be jointly engaged in the search for the proper application of the law as well as the facts.

Mr. FENSTERWALD. That's true.

The COURT. And I think we have done that together pretty well this afternoon.

Is there anything else you want to tell the court?

Mr. FENSTERWALD. That's all.

The COURT. Do you want to proceed on anything further?

Ms. JARUZELSKI. No, Your Honor, unless you have further questions. We have, I think, covered the ground.

The COURT. The Court has before it a motion to dismiss filed by a Member of Congress from Memphis, Tennessee; namely, Donald Sundquist, by Wayne Chastain of that same city.

The plaintiff's complaint indicates that the plaintiff was libeled by virtue of certain letters the defendant wrote to former Attorney General Smith and a high official of the Legal Services Corporation.

It appears that, as to those communications, based on able plaintiff's counsel's admission here in court this afternoon, that those actions of this Member of Congress come clearly within the immunity of the speech and debate clause of the United States Constitution.

And, therefore, whether those letters were defamatory or not, they are entitled to absolute immunity as official acts, as well as the doctrine of absolute immunity for common law torts under well-established and long-established principles of law which the defendant has set forth very ably in its brief.

The second issue is whether the defendant Sundquist is entitled to freedom from exposure for civil liabilities for his actions in issuing general press releases in Washington and Memphis, and for the allegations that he did the same, again, in Memphis, Tennessee to the print and electronic media.

Here, again, that does not involve, however, the doctrine of speech and debate clause immunity.

It does depend for its answer upon whether those actions by the defendant, as a Member of the United States House of Representatives, were official acts within his line of duty, namely, the general principles of a duty of a Member of Congress to inform the public.

It is well established in the law, with an unnecessary to cite authority therefor, that the doctrine of immunity is in large measure based on practical considerations de-

signed and existing primarily to protect the efficient operation of government.

And it does not proceed on the basis that Members of Congress, or others, will always act with perfect or absolute wisdom. They may even make mistakes.

And, if those mistakes or lack of wisdom are made in the outer parameters of their legislative activity, and it appears from the answers by plaintiff's able counsel here that such was the case—and, incidentally, the court agrees with defense counsel that that question really is a legal question—and it further appears to the court that we must understand that implicit within this whole idea of immunity, whether it be absolute or qualified—and the court here holds that it is absolute—is the recognition that there may be error or that a Member of the Congress of the United States be he or she a Member of the House or Senate may err on occasion, but that the immunity doctrine is designed and assumes that it is better to risk some error and possible injury from such error than not to decide to act at all.

The Court's conclusion is based on the longstanding principles of official immunity as enunciated by the Supreme Court of the United States in *Spalding* v. *Vilas,* going back to the year 1896; and *Barr* v. *Matteo,* decided, again, by the Supreme Court of the United States in 1959; and *Butz* v. *Economou,* decided by the Supreme Court of the United States in 1978.

Those cases and others generally stand for the proposition that on the second facet of this case involving these common-law tort claims, such as defamation, that a motion to dismiss is appropriate and proper in that these kinds of claims against people such as the defendant in this case at bar should be cut off at the threshold, provided they were acting within the outer parameters of their line of duty.

And the Court is left with the inescapable conclusion that such was the case here.

And, that being true, it is necessary for the court to grant the defendant's motion to dismiss.

In so doing, the Court has read the complaint and construed the complaint in the light most favorable to the plaintiff, as the Court is obliged to do, but, consistent with these principles that the Court has enunciated in a general way this afternoon, it is equally clear that whether we like it, whether there may have been some act is unimportant.

The trial court's duty is to apply the law as enunciated by the appellate courts and the Supreme Court of the United States, which has been done here this afternoon.

In conclusion, the Court is reminded that if this Court were to hold otherwise, than it has this afternoon in failing to dismiss the instant case, it would act, in effect, as a restraint on the exercise of the duties by a legislative official in respect to matters with wide public interest and concern, which would be far worse than a favorable expression on such matters and that if Congressman Sundquist, or any other Member of that body of which he is now a Member, were so restricted as the plaintiff's kinds of actions here would restrict them, then we would have very little information coming out from the Members of Congress in the way of information involving broad-ranging public policies and, as a result, the public interest would suffer.

For the reasons given, the cases cited in the brief, in addition to those already alluded to this afternoon, the motion to dismiss will be granted and the court will sign an order to that effect.

That's the ruling of the Court.

Thank you very much. I want to say to you, young man, that you did a fine job, as you always do.

Mr. FENSTERWALD. Thank you. Do you want this praecipe?

The COURT. Give it to the clerk.

Mr. Ross. Your Honor, will you be issuing a memorandum opinion?

The COURT. You may order the transcript on the Court's remarks, if you wish. I won't issue an order. Those are my reasons.

[Whereupon, at 3:30 p.m., the above-entitled hearing was concluded.]

CERTIFICATE OF REPORTER

This Record is certified by the undersigned to be the official transcript of the above-entitled hearing.

GLORIA H. HORNING,
*Official Court Reporter.*

APPENDIX C

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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(No. 86-5386)

(CA No. 85-4037)

WAYNE CHASTAIN

*v.*

DON SUNDQUIST

---

Before: WALD, Chief Judge, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG AND SENTELLE, Circuit Judges.

ORDER

Appellee's suggestion for rehearing *en banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

Ordered, by the Court *en banc*, that appellee's suggestion is denied.

*Per Curiam*

For the Court:
CONSTANCE L. DUPRE, *Clerk.*

By: ROBERT A. BONNER,
*Deputy Clerk.*

Chief Judge WALD and Circuit Judges ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG and STARR would grant the suggestion for rehearing *en banc*.

Circuit Judge BORK did not vote on this matter.

APPENDIX D

# In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5386

WAYNE CHASTAIN, APPELLANT

*v.*

DON SUNDQUIST, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, HON. CHARLES R. RICHEY, JUDGE*

BERNARD FENSTERWALD, III
*Fensterwald, Alcorn and Bowman P.C.,*
*1000 Wilson Boulevard, Suite 900,*
*Arlington, Virginia 22209*
*(703) 276-9297*

*Counsel for Appellant.*

# Superior Court of the District of Columbia

No. 8960-85

WAYNE CHASTAIN, PLAINTIFF

*161 Jefferson Avenue, Memphis, Tennessee 38103*

*v.*

DON SUNDQUIST, DEFENDANT

*Member of Congress, Washington, D.C. 20515*

COMPLAINT FOR DAMAGES

NOW COMES THE PLAINTIFF, Wayne Chastain, and states his complaint as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to Section 11-921 and Section 13-423 of the D.C. Code (1981) because the tortious injury complained of herein occurred within the District of Columbia.

PARTIES

2. Plaintiff, Wayne Chastain, is a staff attorney for the Memphis Area Legal Services, Inc. (MALS) and is a resident of Memphis, Tennessee.

3. Defendant, Don Sundquist, is a member of the United States House of Representatives, representing the Seventh District of Tennessee, and maintains an office within the District of Columbia.

FACTS

4. Plaintiff is a staff attorney employed by MALS. As background, MALS is a non-profit private corporation funded by the United States Government *via* grants from the Legal Services Corporation (LSC), established to represent the interests of indigent clients in civil cases.

Plaintiff has, for some time, been engage in protracted litigation involving the Juvenile Court of Memphis and Shelby County, Tennessee, which has denied due process, right to assistance of counsel and equal protection under the law to indigent mothers and fathers, mostly black, who have been jailed because they were too poor to pay arbitrary purge payments to the Court seeking reimbursement for child support welfare payments.

5. Defendant is an elected member of the United States House of Representatives, representing the Seventh Congressional District. This district spans east Memphis, east Shelby County and several rural counties in west Tennessee. The majority of his constituents reside in the affluent suburbs of Shelby County.

6. On January 14, 1985, defendant wrote a letter (Exhibit A) on his official letterhead stationery to William French Smith, then Attorney General of the United States. A copy of this letter was simultaneously released to the Memphis area press and electronic media. This includes the *Commercial Appeal*, a daily Memphis newspaper with a circulation of more than 200,000 subscribers in a four state area, and five television stations which have a viewing audience in five states. Articles relating to this matter and mentioning plaintiff by name subsequently appeared in the press. (Exhibits B and C)

7. In the third paragraph of his above-mentioned letter, the defendant specifically named plaintiff and accused him of (1) working "in concert with two criminal felons," (2) of engaging in "street demonstrations against the above-referenced Juvenile Court" and (3) that plaintiff was hired by MALS solely to harass the Juvenile Court in Memphis.

8. All of these statements are false. In fact, plaintiff has not worked "in concert" with the two ex-felons, so referenced or any other ex-felons in his work, nor has he ever participated in any street demonstrations against the Juvenile Court. Finally, the majority of the duties for which MALS hired plaintiff and the majority of time spent by

plaintiff in his position as a MALS staff attorney involve matters unrelated to the Juvenile Court.

9. In Paragraph Six of the above-referenced letter to the Attorney General, defendant urges the Justice Department to conduct an investigation for criminal conspiary. This statement was made for the purpose of chilling plaintiff from performing his duties pursuant to his employment as a staff attorney for MALS.

10. On or about the same day, defendant dispatched his letter to the Attorney General, defendant also appeared in Memphis and addressed a Memphis civic club luncheon. He repeated there some of the false and defamatory statements that he had previously made in his letter to Mr. Smith.

11. On or about February 27, 1987, Stephen S. Trott, Assistant Attorney General of the United States, confirmed in a letter to plaintiff that defendant had requested the Department of Justice to conduct a criminal investigation of MALS and plaintiff. Mr. Trott expressed his belief that defendant had not presented sufficient evidence that plaintiff had violated any federal criminal statutes or regulations merely because of his representation of indigent clients who were asserting their constitutional rights. (Exhibit D)

12. Subsequent to the Justice Department's refusal to conduct a criminal investigation of MALS and plaintiff, the defendant attempted to have plaintiff disciplined by MALS and/or LSC by writing a letter to Michael Wallace, then serving under an interim appointment to the LSC Board of Directors. (Exhibit E)

13. In his letter to Mr. Wallace, defendant again falsely accused MALS (and indirectly accused plaintiff) of attempting to "discredit . . . local child support enforcement program."

14. This statement was not true. Neither plaintiff nor any other MALS attorney opposes lawful enforcement of the child support laws. Plaintiff and others have only challenged what they feel is an unconstitutional arrange-

ment between the State of Tennessee, local county officials and the Juvenile Court in the adjudication of child support cases.

15. As a result of this second letter, Mr. Wallace ordered an LSC investigator, Steven Aronson, to Memphis to investigate defendant's allegations. Despite the fact Aronson spent five days in Memphis, spending most of his time conferring with Juvenile Court officials, he could find but a few minutes to discuss these allegations with plaintiff, who did provide Aronson with copies of pertinent documents related to his lawsuits *re* Juvenile Court. Mr. Aronson refused to confer with a class representative of one of these lawsuits, Ms. Denetrice Crump, who approached him outside of a meeting in which Mr. Aronson had assembled MALS' Board of Directors for the purpose of threatening to defund the MALS program. Therefore, Mr. Aronson failed to make a completely independent and unbiased investigation of the charges leveled at MALS and plaintiff by defendant.

16. After Mr. Aronson returned to Washinton, D.C., from Memphis, Tennessee, defendant conducted a press conference in Washington, D.C., where he purported to quote from a two-page report submitted to him by Mr. Aronson. Before representatives of both the print and television media, defendant asserted that the situation at MALS was "even worse" than he had imagined. He specifically quoted Mr. Aronson as saying that the federal lawsuits against the Juvenile Court had been filed in violation of LSC regulations.

17. Plaintiff denies that the lawsuit were filed in violation of LSC regulations.

18. Defendant also issued a press release of his statements at the press conference concerning Mr. Aronson's purported report to the Washington, D.C. Bureau staff of the *Commercial Appeal* (Mary Deibel and James Brossman). A full account of the defendant's press conference subsequently appeared in the Memphis edition of the

*Commercial Appeal*, and in at least four news reports on four television stations in the Memphis area.

19. Plaintiff sought to mitigate the damages caused by defendant's defamatory and false statements concerning his role in representing indigent parents before the Juvenile Court in writing two letters to defendant, asking him to retract the above-mentioned statements. Plaintiff further offered to provide defendant with sufficient evidence that no federal child support laws had been violated and that each of the lawsuits had been filed in accordance with LSC regulations. Defendant never responded to either letter.

FIRST CAUSE OF ACTION

20. Paragraphs 1 through 19 above are restated and incorporated herein.

21. As stated above, defendant, in his January 14, 1985, letter to the Attorney General (Exhibit A), which was subsequently disseminated to and by the press and the electronic media in Memphis, Tennessee, accused plaintiff of being hired by MALS "to do nothing but harass Juvenile Court Judge Kenneth A. Turner and court referees Curtis S. Person and William Ray Ingram."

22. In making this communication, defendant intended to defame plaintiff and to ruin his reputation within the Memphis, Tennessee, community.

23. This communication was intended to cause and did cause great injury to the professional reputation of plaintiff and to cause him to be brought under suspicion, criticism and ridicule by his fellow Memphians. In fact, at the time that the communication was made, defendant had made no independent and impartial investigation of the facts and knew or should have known that the statement was false and in making the communication, defendant acted with malice toward plaintiff.

24. The statement mentioned in Paragraph 21 above was false.

25. Plaintiff has always enjoyed a fine reputation in his community for honesty, uprightness of character, truth-

fulness and professionalism which have been damaged by the actions of the defendant.

SECOND CAUSE OF ACTION

26. Paragraphs 1 through 19 above are restated and incorporated herein.

27. As stated above, defendant, in his January 14, 1985, letter to the Attorney General (Exhibit A), which was subsequently disseminated to and by the press and the electronic media in Memphis, Tennessee, accused plaintiff of "working in concert with two convicted felons, Paul A. Savarin and Richard E. Love."

28. In making this communication, defendant intended to defame plaintiff and to ruin his reputation within the Memphis, Tennessee, community.

29. This communication was intended to cause and did cause great injury to the professional reputation of plaintiff and to cause him to be brought under suspicion, criticism, and ridicule by his fellow Memphians. In fact, at the time that the communication was made, defendant had made no independent and impartial investigation of the facts and knew or should have known that the statement was false and in making the communication, defendant acted with malice toward plaintiff.

30. The statement mentioned in Paragraph 27 above was false.

31. Plaintiff has always enjoyed a fine reputation in his community for honesty, uprightness of character, truthfulness and professionalism which have been damaged by the actions of the defendant.

THIRD CAUSE OF ACTION

32. Paragraphs 1 through 19 above are restated and incorporated herein.

33. As stated above, defendant, in his January 14, 1985, letter to the Attorney General (Exhibit A), which was subsequently disseminated to and by the press and the electronic media in Memphis, Tennessee, accused plaintiff

of participation in "street demonstrations against the Juvenile Court."

34. In making this communication, defendant intended to defame plaintiff and to ruin his reputation with the Memphis, Tennessee, community.

35. This communication was intended to cause and did cause great injury to the professional reputation of plaintiff and to cause him to be brought under suspicion, criticism and ridicule by his fellow Memphians. Further, had the statement been true, it would have been a serious violation of the regulations of the Legal Services Corporation and would have subjected plaintiff to dismissal from his staff attorney position and/or other severe disciplinary action. In fact, at the time that the communication was made, defendant had made no independent or impartial investigation of the facts and knew or should have known that the statement was false and in making the communication (especially in light of the potential penalties to plaintiff flowing therefrom), the defendant acted with malice toward plaintiff.

36. The statement mentioned in Paragraph 33 above was false.

37. Plaintiff has always enjoyed a fine reputation in his community for honesty, uprightness of character, truthfulness, and professionalism which have been damaged by the actions of the defendant.

FOURTH CAUSE OF ACTION

38. Paragraphs 1 through 19 above are restated and incorporated herein.

39. As stated above, defendant, in his subsequent letter to Mr. Michael Wallace of the LSC (Exhibit E), accused MALS (and indirectly the plaintiff) of the same charges which he had previously made to the Attorney General (Exhibit A). For example, he accused MALS of attempting "to discredit . . . local child support enforcement program." As a result of this letter, the LSC dispatched one of its investigators, Steven Aronson, to Memphis, Tennessee, wherein he communicated defendant's charges about

plaintiff to a number of persons in the Memphis community.

40. In making his communication to Mr. Wallace, defendant intended to defame plaintiff and to ruin his reputation within the Memphis, Tennessee, community.

41. This communication was intended to cause and did cause great injury to the professional reputation of plaintiff and to cause him to be brought under suspicion, criticism and ridicule by his fellow Memphians. In fact, at the time that the communication was made, defendant had made no independent and impartial investigation of the facts and knew or should have known that they were false. Therefore, in making such communication, defendant acted with malice toward plaintiff.

42. The statement mentioned in Paragraph 39 above was false.

43. Plaintiff has always enjoyed a fine reputation in his community for honesty, uprightness of character, truthfulness and professionalism which have been damaged by the actions of the defendant.

FIFTH CAUSE OF ACTION

44. Paragraphs 1 through 19 above are restated and incorporated herein.

45. As stated above, defendant, subsequent to the return of Steven Aronson, employee of LSC, from his investigation in Memphis, held a news conference in Washington, D.C. in which he alleged that MALS and plaintiff had instituted lawsuits against the regulations of MALS and LSC. After this press conference, defendant issued a press release covering the topics of the conference to the Memphis press.

46. In making this communication, defendant intended to defame plaintiff and to ruin his reputation within the Memphis, Tennessee, community.

47. This communication was intended to cause and did cause great injury to the professional reputation of plaintiff and to cause him to be brought under suspicion, criticism and ridicule by his fellow Memphians. Defendant

had made no independent or impartial investigation of the facts and allegations contained in Mr. Aronson's report and knew or should have known that they were false. Therefore, in making such communication, defendant acted with malice toward plaintiff.

48. The statement mentioned in Paragraph 45 above was false.

49. Plaintiff has always enjoyed a fine reputation in his community for honesty, uprightness of character, truthfulness and professionalism which have been damaged by the actions of the defendant.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court grant to plaintiff relief as follows:

1. Actual damages against the defendant in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

2. Punitive damages against the defendant in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

3. Attorney fees and the costs of bringing this lawsuit; and

4. Any other relief, legal or equitable, that the Court may feel is appropriate.

Respectfully submitted,

WAYNE CHASTAIN.

## APPENDIX E

### EXHIBIT A

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
*Washington, DC, January 14, 1985.*

Hon. WILLIAM FRENCH SMITH,
*Attorney General of the United States,*
*Department of Justice,*
*Washington, DC. 20530*

DEAR MR. ATTORNEY GENERAL: It has been brought to my attention that the Memphis Area Legal Services (MALS) is being operated in a highly questionable manner. My major concern is that this organization may actually be involved in the obstruction of the administration of the Child Support Enforcement laws (Title IV-D of the Social Security Act.)

The activities of MALS regarding this issue may be related to the personal conflict the MALS' Executive Director has expressed with Child Support laws. Indeed, records of the Juvenile Court of Memphis and Shelby County indicate that Mr. Albert R. Thompson has been cited four (4) times during the past year for contempt of court for non-payment of child support. The Agency, under Mr. Thompson's direction, has been responsible during the past year for filing numerous habeas corpus proceedings to free persons jailed for nonsupport. Five (5) MALS-filed lawsuits attacking the child support programs are now pending in the U.S. District Court. Apparently, the MALS Board of Directors is not able to exercise sufficient control over Mr. Thompson.

Also, MALS seems to be employing at least one attorney, Wayne Chastain, to do nothing but harass Juvenile Court Judge Kenneth A. Turner and court referees Curtis S. Person, Jr., and Willian Ray Ingram. These individuals and Mrs. Alma Morris, the MALS client council chairperson, all frequent press-conferences and stage street demonstrations against the Juvenile Court.

It concerns me very much that these individuals, utilizing the services, staff, and facilities of a federally funded agency, should be allowed to launch such a concerted effort to discredit a major federally funded child support enforcement program. The obstruction of the program is especially disturbing when you consider how strongly the Congress spoke on this issue this past summer. As you know, the House voted 413-0 and the Senate 99-0 on a Reagan Administration backed bill to strengthen the collection of delinquent child support programs.

Due to the many alleged irregularities and the possibility of the obstruction of the administration of the law, I would urge that there be an immediate policy and procedural audit of the operation of the Memphis Area Legal Services, and whatever other investigation you deem appropriate.

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EXHIBIT B

[From the Commercial Appeal, Jan. 19, 1985]

## SUNDQUIST APPEALS TO LEGAL SERVICES

(By Terry Keeter)

Representative Sundquist of Memphis said yesterday he has asked the Legal Services Corp. in Washington, as well as the U.S. attorney general, to investigate Memphis Area Legal Services.

The Republican representative's comments came after Rep. Harold Ford of Memphis said he saw no cause for the attorney general to investigate. Should an investigation be called for, Ford said, the proper agency to make it is the Legal Services Corp.

Ford was critical of Sundquist's handling of the matter and said the answer to any Legal Service questions would not come from "going off half-cocked."

"I get along with Harold," Sundquist said. "We work together, and we are friends. But I did not go off half-cocked . . . It was prethought out, logical and not half-cocked.

"My letter to the Justice Department was in addition to a letter to the Legal Services Corp. here in Washington.

"Legal Services Corp. can look at the operations and procedures, but the Justice Department has to look at where there is a potential for an obstruction of justice."

Sundquist said, "I'm concerned about those mothers and those children who are not getting the money they are entitled to under the law . . . which was sponsored by Congressman Ford, by the way."

Sundquist said he had talked with similar agencies about the operations.

"In other Legal Service offices it is the policy to represent the mothers and children first and not the fathers who are not paying the child support," Sundquist said. "I don't think that was the way the law was intended."

Ford said the law was not designed to put indigent parents in jail.

"Having a mother or father in jail does not bring a child money," Ford said.

In related action Wayne Chastain, a Legal Services staff attorney cited in Sundquist's letter to Atty. Gen. William French Smith, has written the attorney general saying he is "really indebted to him for bringing our problems to your attention.

"Perhaps Rep. Sundquist's request for your office to investigate Legal Services will serve as a catalyst for your department to step in and investigate complaints from all sides."

The letter outlined complaints Chastain said the agency has against Juvenile Court and Judge Kenneth Turner.

Chastain is expected to discuss the dispute between Legal Services and Juvenile Court at the monthly meeting of the Kennedy Democratic Club at 7:45 p.m. Monday at Morris' Barber Shop, 1239 North Evergreen.

EXHIBIT D

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
*Washington, DC, February 27, 1985.*

Mr. WAYNE CHASTAIN,
*Staff Attorney, Memphis Area Legal Services, Inc., Memphis, TN.*

DEAR MR. CHASTAIN: Your letter of January 15, 1985, explaining the issues involved in recent litigation between your clients and Shelby County Juvenile Court Judge Kenneth Turner, has been referred to this office for consideration and reply.

You are correct that Congressman Sundquist has asked us to conduct a criminal investigation into the involvement of MALS in these matters. We have carefully reviewed the court opinions in these matters, as well as the facts which you brought to our attention in your correspondence on the subject. We have concluded that there is not sufficient evidence that Federal criminal laws were violated to justify a federal investigation. We are, therefore, not requesting one.

In your letter you stated a belief that the persistent reluctance of Judge Turner to comply with the Sixth Amendment right to effective counsel may violate federal civil rights laws. We are not in a position to address this issue, but we have referred the matter to the Civil Rights Division for their information. You also suggested that the relationship between Judge Turner and non-supported parents might benefit from the intervention of the Community Relations Service, and we have complied with your request to provide them with a copy of your letter.

I trust that this information will be responsive to your needs, and I appreciate your taking the time to bring these issues to our attention.

Sincerely,

STEPHEN S. TROTT,
*Assistant Attorney General, Criminal Division.*
By: John C. Keeney, *Deputy Assistant Attorney General.*

EXHIBIT E

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
*Washington, DC, February 13, 1985.*

Mr. MICHAEL WALLACE,
*Chairman, Operations and Regulations Committee, Legal Services Corporation.*

MR. WALLACE AND MEMBERS OF THE OPERATIONS COMMITTEE: I am happy to see that you have chosen Memphis as the site for your committee meeting. I trust your stay in town will be a pleasant and productive one.

It is my understanding that your committee reviews regulations and procedures that apply to Legal Services offices throughout the country. Because of the unique character of the Legal Services Corporation—and because of the obvious, ongoing need for protecting the rights of those who cannot afford private counsel—I know that your responsibility is an extremely important one.

When I learned of your meeting in Memphis, I felt compelled to let you know of my personal interest in the uniformity of regulations affecting local Legal Services branches. Here in Memphis, I have witnessed the active participation of the Memphis Area Legal Services (MALS) office in lobbying activities—activities which I believe are contrary to the purpose and goals of the LSC and actually serve to obstruct the administration of federal law.

Briefly stated, Memphis Area Legal Services (MALS) has been an active participant in fighting on behalf of fathers who are delinquent in child support payments. Much staff time, services and facilities have been devoted to MALS' concerted effort to discredit our local child support enforcement program. It is more than coincidental to note that the MALS executive director has himself been cited four times during the past year for contempt of court for non-payment of child support.

In reviewing the procedures of some other Legal Services offices, I'm told that in the attorney-assigning process, the LSC priority is placed with the mother and child—not with the father.

As a general rule, I appreciate the rationale for allowing local LSC offices to exercise discretion in determining which cases to take up. But I question the procedures which have allowed the MALS office to go to such extremes in its activism against the local Juvenile Court system. I don't believe the citizens of Memphis—or the nation, for that matter—want their tax dollars used to obstruct administration of one of the most universally supported laws passed by Congress in recent history: the Child Support Enforcement Act of 1984. I believe the actions of MALS reflect the views of the executive director, not the views of Memphians.

It is my understanding that there are some who want to give more latitude to local LSC officials. In many cases, I fear that this approach may result in more improper activism, such as that I have described.

I have been assured by authorities within the LSC that the particular MALS activities I question will be fully investigated. I do not ask at this time that your committee undertake any separate detailed probe. But I do think you will agree that this is an issue which needs to be addressed by this committee. Apparently, regulations pertaining to this matter have not been sufficiently enforced.

I hope you will keep this particular case in mind as you continue the difficult task of setting priorities and devising regulations to affect the future administration of the Legal Services Corporation. You have my very best wishes for a successful future.

Sincerely,

DON SUNDQUIST, M.C.

○

Supreme Court, U.S.
FILED
JUN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1756

# In The Supreme Court of the United States

October Term, 1987

DON SUNDQUIST,

*Petitioner,*

v.

WAYNE CHASTAIN,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 6, 1988

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## QUESTION PRESENTED

Whether Petitioner, a Member of Congress, is immune from common law actions seeking money damages for defamation under the doctrine of official immunity where the actions taken by Petitioner were outside of his legislative responsibilities.

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## OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 833 F.2d. 311. The opinion of the District Court from which Petitioner's appeal flows is found at Petitioner's Appendix B and is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1987. A Suggestion for a Petition for Rehearing *en banc* was denied by the Court of Appeals on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## STATEMENT

1. Respondent, Wayne Chastain, is a staff attorney employed by the Memphis Area Legal Services (MALS), which provides legal services to indigents in southwest Tennessee and is funded by the Legal Services Corporation. Petitioner, Don Sundquist, is a Member of Congress representing the 7th District of Tennessee. In contrast to the largely black, intercity clientele of MALS, Mr. Sundquist's suburban constituency in the Memphis suburbs is predominantly white and largely affluent. *Almanac of American Politics, 1986,* Barone and Ujifusa.

Since 1978, Respondent, as a MALS staff attorney, has fought a protracted legal battle with the Juvenile Court of Memphis and Shelby County and its elected chief judge, Kenneth Turner. This dispute revolves around the court's unjust collection of child support payments from indigent Memphis residents, often involving contempt proceedings and the imposition of jail sentences without affording indigents their constitutional rights to due process and assistance of counsel. Through civil actions pursued by Respondent in the federal courts, many of these rights

have now been secured. See *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

On January 14, 1985, Petitioner, a close friend of Judge Turner, together with one of Judge Turner's court referees, State Senator Curtis Person, wrote a letter on his Congressional letterhead to then Attorney General William French Smith. See Petitioner's Appendix E. Subsequently, a copy of this letter was released to the Memphis media.

In his letter, Petitioner accused MALS of being involved "in the obstruction of the administration of the Child Support Enforcement laws" due no doubt in part to the recent legal victories obtained by Respondent. Petitioner continued by making a series of false allegations about Respondent, including a claim that he had been hired by MALS solely to harass Judge Turner, that Respondent worked in concert with two convicted felons and that Respondent was responsible for organizing street demonstrations against the Juvenile Court. Following release of the letter to the media, Petitioner further defamed Respondent at a civic luncheon in Memphis.

Following Petitioner's letter to the Attorney General, on February 27, 1985, Stephen S. Trott, then Assistant Attorney General, wrote to Respondent that he had reviewed Petitioner's allegations and concluded "that there is not sufficient evidence that federal criminal laws were violated to justify a federal investigation".

Respondent then sought, on two occasions, a retraction from the Petitioner. Failing that, on December 9, 1985, Respondent filed his Complaint in the Superior Court of the District of Columbia. (Petitioner's Appendix

D) Shortly thereafter, Petitioner removed the case to the United States District Court for the District of Columbia.

On April 9, 1986, the District Court, following briefing and oral argument, dismissed Respondent's Complaint, concluding that Petitioner was immune from suit under the doctrine of official immunity as enunciated by this Court in *Barr v. Mateo,* 360 U.S. 564 (1959). Respondent appealed.

Nineteen months later, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, in a well reasoned opinion consistent with the precedents of this Court, reversed and remanded the District Court ruling below.

Circuit Judge Buckley, writing for the majority, found, based principally upon two prior decisions of this Court, *Doe v. McMillan,* 412 U.S. 306 (1973) and *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), that there is no special immunity available to Members of Congress for suits in the nature of defamation other than the protection afforded by the Speech or Debate Clause. U.S. Const. art. 1, sec. 6, cl. 1.

The majority found this holding consistent with both historical and contemporary considerations of policy which have uniformly supported the theory of legislative exposure for common law defamation. The rationale for executive branch immunity rooted in *Barr* does not and should not apply to legislators, whose function is to make the laws, not enforce them, since no authority forces them to act. To the extent that Congress needs a measure of immunity, it was incorporated by the founding fathers

into the Constitution by virtue of the Speech or Debate Clause.

In conclusion, the majority found that:

> The Speech or Debate Clause provides members of Congress with an immunity that is coextensive with their legislative responsibilities. When they move beyond the requirements of their legislative responsibilities, they do so as volunteers, and at their own risk, however important their myriad activities may be in the texture of contemporary political life.

Judge Mikva dissented, finding that the actions of Petitioner fell within his official duties as a Member of Congress and, as such, should be immune so as to allow him to avoid the cost and inconvenience of defending against suits such as the one brought by Petitioner. However, as the majority most forcefully pointed out,

> public accountability is an essential feature of good government . . . the dissent would add a novel judicial protection without any evidence of its need, and do so at the risk of undermining the "good government" it so earnestly seeks. (Petitioner's Appendix at 29a-30a)

Following the panel decision, Petitioner filed a Suggestion for Rehearing *en banc* which was denied on January 27, 1988.

———o———

## ARGUMENT

The decision of the court of appeals below is consistent with the decisions of this Court, other circuit courts of appeals and with other decisions within the District of Columbia Circuit.

1. The decision below has not created, as Petitioner contends, a constitutional crisis between what it terms the "political" (legislative) and the "life tenured" (judicial) branches of government.[1]

Any conflict arising by virtue of the majority opinion is not between these two coordinate branches of government, but between Congress, which seeks authority to speak carelessly and with impunity, and its constituency, the people, who seek some measure of accountability and a check upon unprincipled legislators who would cause great harm to their names and their reputations without feeling the need to be truthful in their remarks.

Any suggestion that a "vital pillar" of the separation of powers will stand or fall based upon the decision below or that the legislative branch will be unable—or afraid—to govern is, quite frankly, ludicrous. To the contrary, one would have expected such a result, or more so, following this Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1959), where Speech or Debate Clause protection for defamation actions was erased.[2]

2. While it is well established that official immunity, in one form or another, is generally available to executive branch officials, *Barr v. Mateo*, 360 U.S. 564 (1979) and has been held applicable in theory to legislative branch of-

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[1] If anything, Petitioner has created a separation of powers problem by his decision to point up House Resolution 446 and its concomitant "parade of horribles" in a Supplemental Brief which is clearly an attempt by the legislative branch to impose its will upon the judiciary.

[2] Petitioner makes much of the threat of impending litigation, yet offers no evidence that any such threat has or would materialize.

ficials, *Doe v. McMillan,* 412 U.S. 306 (1973), in no instance has this Court nor has any other court reported that the official immunity doctrine protects Members of Congress from common law defamation actions. To the contrary, this Court has, on two separate occasions, held just the opposite.

In *Doe,* supra, this Court stated, in an action brought against Members of Congress, their staffs, the Public Printer and the Superintendent of Documents, that:

> We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors . . . The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, *and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity" . . ., *they enjoy no special immunity* from local laws protecting the good name or the reputation of the ordinary citizen. (at 324) (emphasis added)

Read plainly, Petitioner is not entitled to relief under any theory of immunity, Constitutionally mandated or otherwise. The Court's holding in *Doe* was affirmed in *Hutchinson,* supra, where, quoting the prior decision, it was noted:

> A Member of Congress may not with impunity publish or libel from the speaker's stand in his home district . . . (at 130)

Respondent can reach no conclusion, other than that reached by the majority below, that Members of Congress are not immune from defamation actions.[3]

To reverse the majority below would completely undermine the rationale behind this Court's hold in *Hutchinson*, supra, which precluded any attempt to grant Congressmen a license to libel.

3. Any potential inconsistency created by denying official immunity to Members of Congress in defamation actions is resolved by either of two theories.

The first, and most logical, is that this Court has interpreted historical and public policy considerations as barring blanket protection from defamation actions. As the majority below points out,

> the historical record reveals an explicit, previously unquestioned rule of liability for a legislator's published libel on one hand, and immunity for executive officials . . . The accumulated wisdom accounting for this differentiation counsels against the grant of immunity sought by appellee. (Petitioner's Appendix at 22a).

Second, the founding fathers apparently recognized that some level of immunity for legislative actions was necessary to our governmental framework and they incorporated it into the Constitution. Executive immunity has developed along a separate track, and the two have crossed only rarely. To the extent immunity is available

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[3] Respondent recognizes that the Court's holding in *Hutchinson* was based solely upon the conclusion that the Speech or Debate Clause did not bar recovery. Nonetheless, Respondent concurs with the majority that there is no "blanket protection for libel suits". (Petitioner's Appendix at 13a)

for defamation, historically it was considered fair that legislative acts be protected by the Speech or Debate clause, or not at all.

4. As the majority below pointed out, the rationale for *Barr*, does not extend to legislators. Unlike the executive branch official who is obligated to enforce the laws enacted by Congress and to exercise enforcement discretion, the legislator has complete freedom in declaring the laws of our nation and control over their actions. The executive, on the other hand, lacks such control, and therefore the judicial doctrine of official immunity was developed.[4]

5. Petitioner argues the need to protect a Member's communication with his constituents as "one of our democracy's main channels of popular *accountability* and *responsiveness*" (Petitioner's Brief, at 13). (emphasis added). By the same token, a Member must act responsibly in making such communications and, just as he seeks to hold his constituent accountable, the constituent must be able to likewise hold the Member accountable.

One cannot imagine this concept being more important than at the height of a political contest, where spirits run high, tempers run short and where there is the tendency for candidates to make statements which "excite political passions." (Petitioner's Brief at 12) At the same time, there is often a tendency to ignore the accuracy of the

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[4] Petitioner urges the Court to adopt the "functional" test utilized in *Forrester v. White*, 484 U.S. — (1988) and find that the informing function of Congress requires a grant of official immunity. To the contrary, it is the abuse of that process, often in a purely political context, which is at issue here and for which no immunity should be allowed.

statements which are made, or to make them without proper investigation. By granting what Petitioner seeks, challengers for federal legislative office are placed at a distinct disadvantage since incumbents would be granted *carte blanche* to speak their mind without fear of being held accountable.

6. Contrary to Petitioner's claim that the decision below has turned Members into a cadre of "walking deep pockets" (Petitioner's Brief at 15), the real effect of the decision is that it puts them on an even par with everyone else, at least as to defamation. This result is not dissimilar from that reached recently in *United States v. Ford,* 830 F.2d 596 (6th Cir. 1987), where the panel reversed a "gag order" imposed by the District Court upon a Member under criminal indictment, concluding that "the representative be *as free* as his constituents" (at 601) (emphasis added) to speak his mind on issues of importance to him and to his freedom. By the same token, however, is the undeniable notion, supported by this Court's prior decisions in *Hutchinson,* supra and *Doe,* supra that a representative is not any freer than those that he represents. Petitioner should get no more and no less.

Nonetheless, *Ford* is clearly distinguishable from the instant case, except for the limited purpose alluded to above, since *Ford* involved a flagrant attempt by the judicial branch, through a *sua sponte* gag order, to stifle political communication while Respondent is merely seeking to pursue a civil remedy for damages already incurred.

Other cases cited by Petitioner, including, among others, *Hartley v. Fine,* 780 F.2d 1383 (8th Cir. 1985); *Morrison v. Jones,* 607 F.2d 1269 (9th Cir. 1979); *Kuzinich*

*v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982) and *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986) are completely inapposite either because 1) they involve state or local legislators who do not already enjoy the benefits bestowed by the Speech or Debate Clause or 2) they do not involve issues of alleged defamation, which has obviously been the subject of separate consideration by this Court.

7. Finally, Petitioner complains of the "great menace inherent in inviting litigation against Members" and the " 'social costs' of such suits" (Petitioner's Brief at 15-16) and suggests that it is ample foundation to require immunity for Petitioner. While Respondent concedes in theory the propriety of this rationale as it extends to executive branch officials who, day in and day out, must enforce the laws enacted by Congress with often unpleasant consequences, no such heavy burden rests on Petitioner's shoulders. He has the freedom to act or not act as he so chooses.

At the other end of the scale is the potential menace and social costs inherent in giving a legislator too much freedom to speak his mind. As the majority below commented (Petitioner's Appendix at 27a):

> Among the many problems with this position is that of distinguishing between congressional activity undertaken to further a constituent's interests and that undertaken to further the member's interest in reelection. The line between the two can be as fine as the line that separates privilege and license; and it takes little imagination to see the ease with which, in the heat of political contest, an immunity from suit for common law libel becomes a license to libel.

This, rather than the arguments advanced by Petitioner, is the heart of the case presented herein to the Court.

———o———

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 6, 1988

Supreme Court, U.S.
FILED
MAY 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1756

# In the Supreme Court of the United States

OCTOBER TERM 1987

THE HONORABLE DON SUNDQUIST, PETITIONER,

*v.*

WAYNE CHASTAIN, RESPONDENT.

***SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

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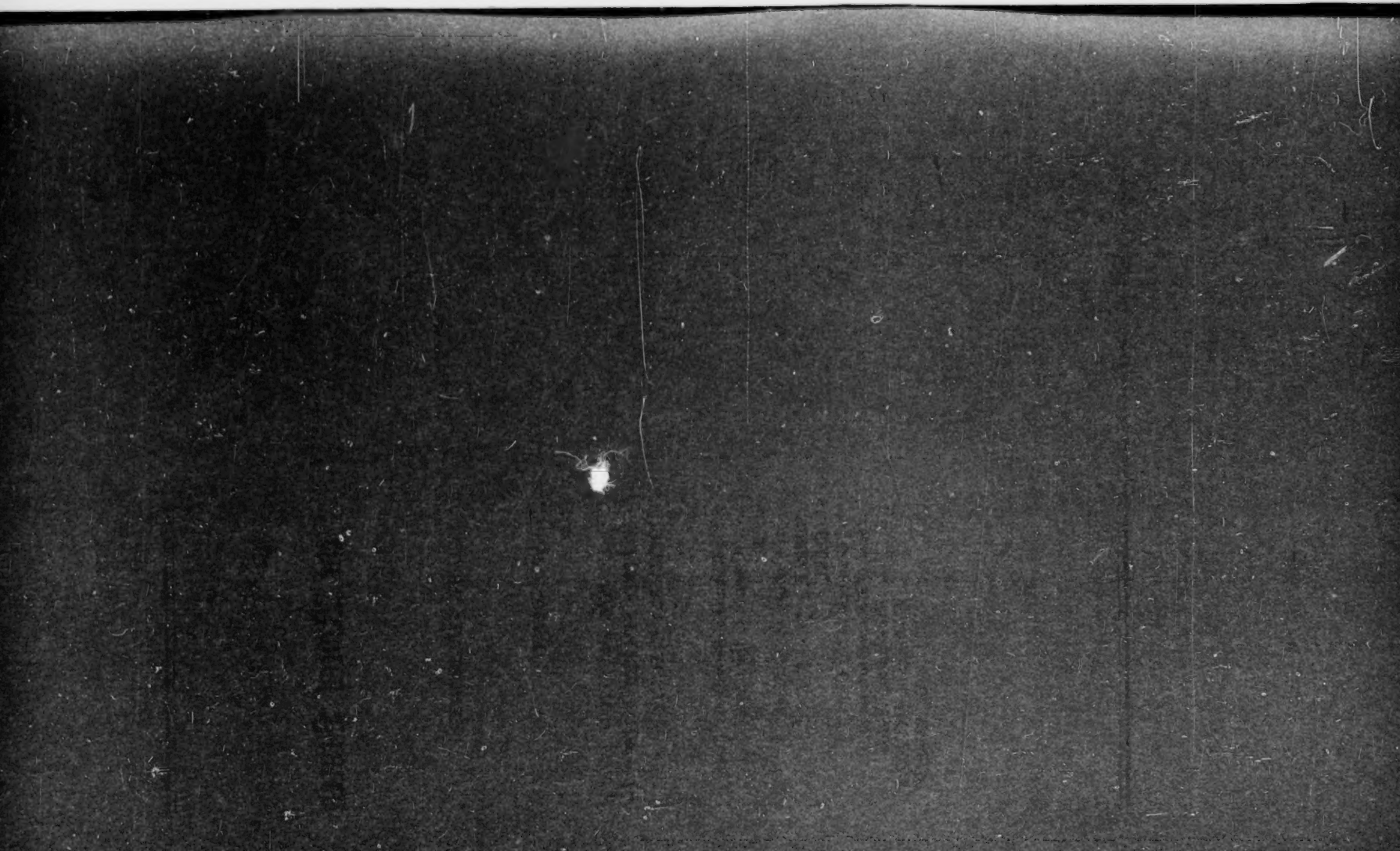
MAY 1988



# In the Supreme Court of the United States

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THE HONORABLE DON SUNDQUIST, PETITIONER

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WAYNE CHASTAIN, RESPONDENT

---

**SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

On May 12, 1988, the United States House of Representatives, by the unanimous vote of 413-0, adopted H.R. Res. 446, 100th Cong., 2d Sess. ("Foley-Michel Resolution"), a privileged resolution specifically relating to this litigation.[1] By adoption of the resolution, the House of Representatives declared its belief that this case presents issues of vital importance to the "necessary and proper functioning of the House of Representatives as a coordinate branch of government" and therefore, the House "respectfully requests the Supreme Court of the United States to grant a writ of certiorari so that it may review this matter. . . ." App. A at 3a. Pursuant to Rule 22.6 of the Rules of the Supreme Court, this supplemental brief calls to the Court's attention this new legislation.

House Resolution 446 was introduced by Majority Leader Thomas S. Foley on behalf of himself and Republican Leader Robert Michel. In announcing his intention to offer the privileged resolution, Majority Leader Foley described the resolution as follows:

---

[1] The full text of the Resolution appears as Appendix A.

> It involves the question of whether Members of Congress will retain official immunity for more than purely legislative acts.
>
> If the current decision of the U.S. Court of Appeals were to remain on the books, there would be a situation which would call into doubt the vulnerability of every Member of this body to civil suit for acts that have always been considered part of the official responsibility of Members, and the potential liability to each Member should be understood clearly.
>
> Second, the inhibition that would be imposed on Members in carrying out representation of their constituents in a manner long understood, in fact from the foundation of this Republic understood to be a part of the legislative responsibility of individual Members. This is not a partisan matter. It is a matter of the privileges of this House and the privileges of Members, and the purpose of this resolution is to send an overwhelming, unanimous vote of this body to the Supreme Court respectfully asking that they take up and review this case.
>
> So I hope that there will be no misunderstanding about it. It goes back, in fact, to precedents in the 14th Century in the history of the House of Commons, and I do not wish any Member to underestimate the signal importance of this matter to the functioning of the House of Representatives and to his or her individual responsibilities as Members.

134 Cong. Rec. H 3168 (daily ed. May 11, 1988).

The Foley-Michel Resolution clearly states the belief of the House of Representatives that "the decision of the divided panel of the Court of Appeals raises the most serious concerns for the doctrine of separation of powers provided in the Constitution and for the ancient and historic rights and privileges of the House. . . ." App. A at 2a. The Foley-Michel Resolution then declares the House's perception that "the decision of the divided panel of the Court of Appeals, if left standing, will have an adverse effect on the performance of important official duties by Members of the House and will deprive citizens of infor-

mation about the functioning of their government. . . ." App. A. at 2a-3a.

The motivation and intent of the House of Representatives in adopting this unusual resolution is easily gleaned from the "resolved" clauses of the resolution:

> Resolved, That the House of Representatives considers the informing of citizens and executive branch agencies on matters of public importance to be a part of the official duties of a Member of the House; and be it further
>
> Resolved, That the House of Representatives considers it to be appropriate that Members of the House engaged in the performance of their official duties will be treated by the Courts with the same respect and protection presently afforded by the Courts to all other public officials; and be it further
>
> Resolved, That the House of Representatives views with deep concern the decision of the divided panel of the Court of Appeals of the District of Columbia Circuit in the case of Wayne Chastain v. The Honorable Don Sundquist because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people; and be it further
>
> Resolved, That the House of Representatives respectfully requests the Supreme Court of the United States to grant a writ of certiorari so that it may review this matter, and reach a just result; and be it further
>
> Resolved, That the Clerk of the House shall forthwith transmit a certified copy of this resolution to the Honorable Clerk of the Supreme Court.

App. A at 3a.

The May 12, 1988, debate on the House floor with respect to the resolution provides a clear indication of the House's view that Supreme Court review is necessary in this case.[2] Majority Leader Foley, the resolution's author and floor manager, described to the House the purpose of

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[2] The House floor debate is reproduced in its entirety as Appendix B.

the resolution. "The resolution expresses, to the Supreme Court of the United States, we will be asking that the Court grant review of a recent decision of the Federal Court of Appeals for the District of Columbia Circuit which impacts on the day-to-day operation of the House and its Members." App. B at 4a.

Majority Leader Foley then described the factual and procedural background of Representative Don Sundquist's Petition for Certiorari. He paid particular attention to what he described as the "strange treatment of the matter by the court of appeals. . . ." App. B at 7a. Recounting the Circuit's denial of Representative Sundquist's suggestion of a rehearing en banc, Majority Leader Foley informed the House that "[t]he 6 to 5 plurality vote constituted only half, not a majority, of all judges in regular active service. Therefore, the opinion of the two-judge majority stands as the decision of the circuit. Thus, a decision which affects each and every Member of Congress in his day-to-day performance of his official duties remains in effect even though a plurality of the judges on the circuit have called for a reassessment of that opinion." App. B at 6a–7a.

As the Majority Leader expressed to the House, "[t]his strange treatment of the matter by the court of appeals simply highlights the need for the Supreme Court to review this decision." He described the intent and purpose of the resolution:

> What we do today is to express the institutional desire of the House, as a coordinate branch of government, to obtain this Supreme Court review. The resolution does not ask the Court to decide the case in any particular fashion; though we may all have thoughts on what the proper outcome should be. However, it should be clear that this resolution does not seek any particular outcome, it only seeks to have the Supreme Court review this matter.

App. B. at 7a.

The Republican Leader, Robert Michel, co-sponsor of the resolution, spoke next. He proclaimed that the "reso-

lution has one central and vital purpose—and that is to urge the Supreme Court to clarify the constitutional parameters of our official acts as Representatives of the American people." App. B at 8a. Republican Leader Michel stated his belief that "it is essential that the underlying case, Chastain against Sundquist receive the total and thorough attention of our highest judicial body." App. B at 8a. He summarized his view on the matter thusly:

> That is why, Mr. Speaker, this case is so important. We must be able to speak and act freely within the bounds of our official duties if we are to continue to represent a free and strong people. If we are unable to speak forthrightly and fairly within the bounds of our official duties, we will be less able to represent the people we are elected to serve.

App. B at 10a–11a.

The impact of the Court of Appeals decision on the continued vitality of the representative process was a refrain that several Members of the House sounded during the consideration of H.R. Res. 446. Representative Sam Gejdenson pointed out that "[i]t is clear that among our primary responsibilities is being advocates for our constituents within the bureaucracy and challenges that they face. Half our work at times may be the work of serving our constituents." App. B at 13a. Representative Gejdenson described this constituent service as that which "restores the faith of people in the governmental process[, people] who have been trampled by the bureaucracy or larger corporations. Often our role as advocates may be as important as our role as legislators in seeing that this Government serves its people." App. B at 14a. In supporting the resolution, Representative Gejdenson stated that he was "particularly concerned about the impact th[is] case may have on the ability of Representatives and Senators to help their constituents who have trouble with Federal agencies." App. B at 14a.

Representative Henry Hyde harkened back to the protest written by Thomas Jefferson and James Madison

when the judiciary sought to interpose itself between a Member of the House and his constituents in the earliest days of our Republic. App. B at 15a–16a. Representative Hyde applied teachings of that constitutional experience to the present situation faced by Congressman Sundquist.

> Mr. Speaker. I know of few observations so prophetic as Jefferson's, when he says that constituent newsletters are "the substance of representation" and all the rest merely "the shadow." I know that I do not relish being fitted for a judicial muzzle. I find myself in firm agreement with our former colleague, Abner Mikva, who was the vigorously dissenting judge in Congressman Sundquist's case. In this case, his dissent has truly said to those of us on opposite sides of the aisle, that while we may disagree with each other about what we say, we must defend each other's right to say it. As Judge Mikva warned, without judicial protection for communication with constituents, "we are liable to have a Congress that is deterred from the vigorous exercise of its constitutional responsibilities."
>
> And so, on the eve of the bicentennial year of the Constitution's ratification, I can think of no case more worthy than this of the granting of the writ of certiorari by the Supreme Court. I urge adoption of a resolution to recommend this course to the Supreme Court.

App B. at 16a–17a.

Finally, Representatives Charles Schumer and Trent Lott spoke of the chilling effect on the representational process of the Court of Appeals opinion. Congressman Lott described the opinion as "cast[ing] a pall over the ability of Members of Congress to take part in public debate." He found that "[i]t is a very important part of our responsibility as a Member of Congress to be able to speak out on these public issues." App. B at 24a–25a.

Representative Lott, the Republican Whip, analyzed the logic and impact of the Court of Appeals opinion in the following stark terms:

> It astonishes me that a Federal court could say that every other officer of the Federal Government receives official protection, but Members of Congress do not, when speaking out on public issues within their responsibilities.
>
> I sincerely hope that the Supreme Court will review this case and in its most careful manner will reverse the lower court decision. It does go to the basic fundamentals of our guarantees as Members of Congress, and I do think this is a forerunner of what could be a whole number of this type of lawsuits being brought against Members of Congress to tie us up and to shut us up.

App. B. at 25a.

Representative Schumer also noted the chilling effect the Court of Appeals decision would have. Members, he noted, would effectively "be sealed off from communicating with the people we represent. . . ." He summarized the intrusion of the Court of Appeals opinion:

> How empty would the right of the people to petition the Congress be if the Congress and its Members could not communicate back to those who petition. The intrusion by the court of appeals into this fundamental process of give and take between the Congress and the people must be undone.

App. B. at 19a–20a.

As this debate and the Foley-Michel Resolution that was adopted by the unanimous vote of 413–0 amply demonstrate, the issues raised in Congressman Sundquist's petition are of singular importance to the House as a coordinate branch of government. This Court should heed the call of the House and grant the petition so that it, as the highest judicial tribunal can decide the question presented: Does the doctrine of official immunity, which the

courts have extended to all other public officials, apply to Members of Congress for actions taken in their official though non-legislative roles?

Respectfully submitted,

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*Attorneys for Congressional Defendant.*

MAY 1988.

## APPENDIX A

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**H. Res. 446**

***In the House of Representatives, U.S.,***

*May 12, 1988.*

Whereas, consistent with the Constitution and the history of parliamentary bodies, the Members of the United States House of Representatives have always considered it to be an integral part of the official responsibilities of Members of Congress to inform the citizens they represent and the agencies of government regarding issues of public importance;

Whereas, the judiciary of the United States has in a long series of decisions established the doctrine of official immunity pursuant to which all public officials are provided certain protections from civil liability when engaged in the good faith performance of their official functions:

Whereas, in 1985 Representative Don Sundquist, a Member of this House, communicated with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of the congressional district which he represents, informing them of an ongoing issue of public importance, a controversy relating to the expenditure of federal funds by the Memphis Area Legal Services in that federally funded organization's continuing dispute with the State of Tennessee's judicial branch;

Whereas, Wayne Chastain an attorney with the Memphis Area Legal Services filed suit against Representative Sundquist seeking in excess of one million dollars in personal damages based on Representative Sundquist's official communications with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of Tennessee;

Whereas, the United States District Court for the District of Columbia dismissed the suit, holding that Representative Sundquist's actions were official and that for the good faith performance of their official duties Members of Congress, like all other public officials, are protected from civil liability;

Whereas, on November 6, 1987, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, departed from the precedent of that Court and the Supreme Court and reversed the ruling of the District Court holding that the doctrine of official immunity, which provides certain protections from civil liability to all public officials engaged in the good faith performance of their official duties, was not applicable to the official actions of a Member of Congress;

Whereas, despite the expressed desire of a majority of the participating judges of the Court of Appeals for the District of Columbia Circuit to review the decision of the panel's majority by rehearing the case en banc, the en banc Court of Appeals declined to rehear the case;

Whereas, Representative Sundquist, through the Office of General Counsel to the Clerk of the House, is presently seeking a writ of certiorari from the Supreme Court of the United States;

Whereas, the decision of the divided panel of the Court of Appeals raises the most serious concerns for the doctrine of separation of powers provided in the Constitution and for the ancient and historic rights and privileges of the House; and

Whereas, the decision of the divided panel of the Court of Appeals, if left standing, will have an adverse effect on

the performance of important official duties by Members of the House and will deprive citizens of an irreplaceable source of information about the functioning of their government: Now, therefore, be it

*Resolved,* That the House of Representatives considers the informing of citizens and executive branch agencies on matters of public importance to be a part of the official duties of a Member of the House; and be it further

*Resolved,* That the House of Representatives considers it to be appropriate that Members of the House engaged in the performance of their official duties will be treated by the Courts with the same respect and protection presently afforded by the Courts to all other public officials; and be it further

*Resolved,* That the House of Representatives views with deep concern the decision of the divided panel of the Court of Appeals of the District of Columbia Circuit in the case of Wayne Chastain v. The Honorable Don Sundquist because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people; and be it further

*Resolved,* That the House of Representatives respectfully requests the Supreme Court of the United States to grant a writ of certiorari, so that it may review this matter, and reach a just result; and be it further

*Resolved,* That the Clerk of the House shall forthwith transmit a certified copy of this resolution to the Honorable Clerk of the Supreme Court.

APPENDIX B


# Congressional Record

PROCEEDINGS AND DEBATES OF THE 100th CONGRESS, SECOND SESSION

Vol. 134 WASHINGTON, THURSDAY, MAY 12, 1988 No. 66


## House of Representatives

**PRIVILEGES OF THE HOUSE—RELATING TO THE DUTIES AND PRIVILEGES OF MEMBERS OF THE HOUSE OF REPRESENTATIVES**

Mr. FOLEY. Mr. Speaker, I offer a privileged resolution (H. Res. 446) and ask for its immediate consideration.

The Clerk read the resolution.

The SPEAKER pro tempore (Mr. SCHUMER). The resolution presents a question of privilege, and the Chair recognizes the gentleman from Washington for 1 hour.

Mr. FOLEY. Mr. Speaker, for purposes of debate only, I yield 30 minutes to the distinguished gentleman from Illinois [Mr. MICHEL], pending which I yield myself such time as I may consume.

Mr. FOLEY. Mr. Speaker, on behalf of the Republican leader, Mr. MICHEL and myself, I have introduced this privileged resolution. The resolution expresses, to the Supreme Court of the United States, a respectful request of this House. By adopting this resolution we will be asking that the Court grant a review of a recent decision of the Federal Court of Appeals for the District of Columbia Circuit which impacts on the day-to-day operation of the House and its Members.

The litigation at issue, Chastain versus Sundquist, is a civil action which alleges that Congressman SUNDQUIST, our colleague from Tennessee, included defamatory material in a letter which he sent to a Federal agency discussing an issue of public importance and controversy in the Memphis area. Specifically, Representative SUNDQUIST, in his letters and in his discussions with his constituents, expressed his concerns with respect to the operation of a federally funded program, the Memphis Area Legal Services.

Mr. Chastain, an attorney employed by the Memphis Area Legal Services, filed suit against Representative SUNDQUIST. The General Counsel to the Clerk, representing Representative SUNDQUIST, moved for a dismissal. The U.S. District Court for the District of Columbia dismissed the case holding that the Representative had been engaged in the official activities of communicating with Federal agencies and with his constituents on matters of Federal policy, and that when engaged in official actions Members of Congress, like all other public officials, receive the protections of the doctrine of official immunity. Under that long-established judicial doctrine, public officials engaged in the performance of official duties can only be held liable in a civil action for the violation of clearly established standards of constitutional or statutory law. Mr. Chastain's suit did not allege that Representative SUNDQUIST had violated any statutory or constitutional provision and, therefore, the doctrine of official immunity required the dismissal of the lawsuit.

On appeal, however, a divided three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit overturned the dismissal. The two-judge majority wrote that although Mr. SUNDQUIST had certainly been acting within the sphere of his official, though not legislative, duties, Members of Congress, alone among all public officials, are not eligible to receive the protections provided by the doctrine of official immunity. The majority reasoned that since the Constitution provides Members with

an absolute immunity for their legislative actions, no other immunity should be provided. This reasoning leaves Members, who are the only officials the framers of the Constitution believed required an immunity, more exposed to litigation than all other public officials.

Judge Mikva dissented from the ruling of the majority, writing that it made no sense to treat Members in this fashion. Judge Mikva noted that the role of the Representative, today and throughout history, has included many official functions which are not legislative. The dissent then points out that in a departure from the established precedent of this circuit and the Supreme Court, the panel's majority had denied to Members of Congress a protection that the courts had routinely extended to all public officials ranging from Cabinet officers to local postmen. Judge Mikva could have gone further because, in fact, the courts have extended this immunity to cover the official actions of public officials including dog-catchers, local liquor licensing boards, and a variety of judges and court personnel.

After this panel decision, Representative SUNDQUIST sought a rehearing by the entire court of appeals. This request was based on the panel's departure from the established precedent of the circuit and on the serious flaws contained in the two-judge majority's reasoning. Under the rules of this circuit, such a review will be granted if a majority of the judges in regular active service vote to rehear the case. Earlier this year, the court of appeals acted on Representative SUNDQUIST's request for a rehearing. Six judges on the circuit voted to rehear the case. Five judges voted not to rehear the case. Judge Bork, who at the time had announced his departure from the bench was still officially a member of the court, declined to participate. The 6-to-5 plurality vote constituted only half, not a majority, of all judges in regular active service. Therefore, the opinion of the two-judge majority stands as the decision of the circuit. Thus, a decision which affects each and every Member of the Congress in

his day-to-day performance of his official duties remains in effect even though a plurality of the judges on the circuit have called for a reassessment of that opinion.

This strange treatment of the matter by the court of appeals simply highlights the need for the Supreme Court to review this decision. Representative SUNDQUIST has now filed with the Supreme Court a petition for a writ of certiorari. If the Court grants the writ, it will review the decision of the court of appeals. What we do today is to express the institutional desire of the House, as a coordinate branch of government, to obtain this Supreme Court review. The resolution does not ask the Court to decide the case in any particular fashion; though we may all have thoughts on what the proper outcome should be. However, it should be clear that this resolution does not seek any particular outcome, it only seeks to have the Supreme Court review the matter.

This resolution is unusual but not unique. In the 97th Congress, I offered and the House adopted a similar resolution asking the court of appeals to review a decision of a three-judge panel which, on a 2-to-1 vote, had ruled that it was unconstitutional for the House to select and maintain a Chaplain of the House. After the adoption of that resolution, the court of appeals granted a motion for rehearing and vacated the panel's decision. Eventually the constitutionality of our actions in selecting and maintaining a Chaplain was clearly vindicated by the court.

Through this resolution, the House does not take sides in an extra-legislative dispute between persons or policies in the Nation at large. Through all its history, the House has spoken on questions of privilege recognized pursuant in its rule IX as "affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings." This role goes back, beyond even the framing of the Constitution two centuries ago, to the early stirrings of legislative consciousness in the medieval House of Commons. As described in the authoritative treatise on Parliamentary Procedure by Sir Thomas Erskine May, in

"Haxey's Case" in 1396, a member of the House of Commons at first was condemned as a traitor for proposing a bill for reducing the excessive charge of the royal household. The House of Commons came to the aid of Haxey, by successfully asking for reconsideration of the judgment against him, which in review was annulled. So, too, at this time, this House responds to a suit brought against one of its own Members, concerning that Member's own actions, and raising an issue concerning the House's own ability to discharge its responsibilities.

For these reasons, I believe that it is important for the Supreme Court to recognize the vital importance of this question to the House of Representatives and adoption of this resolution will express to the Court the institutional interest in this matter on behalf of the House. I urge all my colleagues to support this resolution.

Mr. Speaker, I reserve the balance of my time.

Mr. MICHEL. Mr. Speaker, I yield myself such time as I may consume.

(Mr. MICHEL asked and was given permission to revise and extend his remarks.)

Mr. MICHEL. Mr. Speaker, I rise in support of this resolution which I have cosponsored with the gentleman from Washington [Mr. FOLEY].

This resolution has one central and vital purpose—and that is to urge the Supreme Court to clarify the constitutional parameters of our official acts as Representatives of the American people.

I believe it is essential that the underlying case, Chastain against Sundquist receive the total and thorough attention of our highest judicial body.

Before addressing some of the substantive issues involved in this case I should like to outline the facts and the pleadings of the case up to this point.

The basic facts are as follows:

In January 1985, our colleague, the gentleman from Tennessee [Mr. SUNDQUIST], acting in his official capacity as a Congressman, sent a letter to the Attorney General

of the United States concerning the activity of a group in his district, the "Memphis Area Legal Services," commonly referred to as MALS.

In this letter Mr. SUNDQUIST alluded to the plaintiff, Mr. Chastain, a staff attorney for MALS, in such a way as to trigger this defamation of character suit. Later, Mr. SUNDQUIST publicized his views concerning Mr. Chastain and MALS in his congressional district.

The defamation of character suit was originally brought in D.C. Superior Court. It was removed by motion of Mr. SUNDQUIST to the U.S. District Court for the District of Columbia where a motion by Mr. SUNDQUIST to dismiss based on official immunity was granted.

However, upon appeal, a divided three-judge panel of the U.S. Circuit Court of Appeals for the District of Columbia reversed the lower court decision and held that "Members of Congress are not entitled to immunity for common law tort suits even if committed while acting in the scope of their official acts."

Mr. SUNDQUIST's motion for reconsideration by the full circuit court failed on a 6-to-5 plurality vote, because at the time Judge Bork, the 12th judge on the circuit, did not vote, and the rules of the court require a majority of all sitting judges. In this case it meant seven, not six, was the required number for a majority.

A petition for a rehearing also failed, so Mr. SUNDQUIST filed for certiorari before the Supreme Court, which now must first decide whether to hear the case, and if so, then decide on its merits.

Before proceeding further I believe we should pause for a moment to reflect on another very important case that bears on this. I refer to Hutchinson versus Proxmire decided by the Supreme Court, some 9 years ago.

In that case, the Supreme Court stated that the "speech or debate clause does not protect transmittal of information by individual Members of Congress by press release and newsletters."

Members will recall that in the Hutchinson case a Member of the Senate in his "golden fleece" award offended a scientist doing research on monkeys at the National Institute of Health.

The Hutchinson case stands as an important landmark of constitutional law, but I do not believe it governs the outcome of the case at hand.

The activity of the legislator in the Sundquist case is, in my opinion, clearly within the perimeters of official acts. Such things as writing to Cabinet officers and informing your constituents are vital, basic and essential functions for any Member of Congress.

There is indeed a large body of law that insulates judges and executive branch officials from tort liability for their official acts. Let us hope the same standard is available to Members of Congress in addition to our precious speech or debate privilege embodied in the text of the Constitution itself.

There are, you know, several ways for the people to have a free voice in the affairs and events of their time. They are allowed to speak individually for themselves under the first amendment and of equal importance, they look to their elected representatives—that's us—to speak up for them.

They are counting on us to speak, not only on the floors of the House and Senate in regular debate, but also through the advancing electronic and ever-expanding means of modern communications.

When the founders codified the speech or debate clause, they also recognized the existence of official immunity but I'm not so sure they ever imagined the television technology that would multiply and transmit the words and images of this Chamber to millions of television viewers across the Nation and the world.

That is why, Mr. Speaker, this case is so important. We must be able to speak and act freely within the bounds of our official duties if we are to continue to represent a free and strong people. If we are unable to speak forthrightly

and fairly within the bounds of our official duties, we will be less able to represent the people we are elected to serve.

That is why, Mr. Speaker, this resolution, like the resolution we adopted 6 years ago petitioning the full court of appeals to hear the Chaplain case, should be overwhelmingly adopted today.

Mr. Speaker, I would ask then to include with my remarks at the conclusion of my opening remarks the text of our "Dear Colleague" letter that the gentleman from Washington [Mr. FOLEY] and I jointly signed to the membership.

I will reserve the balance of my time.

HOUSE OF REPRESENTATIVES,
*Washington, DC.*

DEAR COLLEAGUE: On Wednesday, May 11, 1988, we will seek floor consideration of a privileged resolution. The resolution requests the Supreme Court to review a recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Chastain* v. *Sundquist.* The Speaker and the Bipartisan Leadership of the House believe that the opinion of the divided panel of the Court of Appeals represents a significant departure from established precedent and seriously threatens the proper functioning of Members of the House as representatives of the American people.

The Court of Appeals has held that Members of Congress do not receive the protections provided to all other public officials under the doctrine of official immunity. This ruling was issued, and permitted to stand, by a sharply divided Court of Appeals in a million dollar lawsuit brought against our colleague, Don Sundquist.

Congressman Sundquist had written letters to the appropriate Executive Branch officials expressing his concern with the allocation of resources, and the manner of operation, of the Memphis Area Legal Services, a federally funded entity. He also brought these concerns on this

ongoing public controversy to the attention of his constituents.

A lawyer, who was mentioned in one of the letters, brought suit against Congressman Sundquist alleging that the communications with the Executive Branch and with the public had been defamatory. The suit sought in excess of one million dollars in damages.

Congressman Sundquist was represented by the General Counsel to the Clerk of the House. The District Court dismissed the suit, holding that Congressman Sundquist had been engaged in his official duties and, therefore, was protected by the doctrine of official immunity. Pursuant to that doctrine, all public officials who are engaged in the discretionary performance of their official functions can only be subjected to suit and liability for violations of clearly established standards of statutory or constitutional law. Since the Plaintiff had not alleged that Congressman Sundquist had violated any statute or constitutional provision, the District Court dismissed the case.

On appeal a three-judge panel ruled, on a two-to-one vote, that Members of Congress engaged in official, but not legislative actions, receive no protection whatsoever. The justification for this treatment, which differs from the treatment accorded every other public official at all levels and in all branches of government, was that the Constitution provides Members with an absolute privilege for legislative actions under the Speech or Debate Clause and that, therefore, no other privilege would apply.

Judge Mikva, a former Member of the House, dissented and wrote a strongly worded opinion which argued for the application of the immunity and pointed out that the two-judge majority was departing from the established precedent of the Court of Appeals.

Congressman Sundquist sought to have the decision reviewed by the full Court of Appeals, but despite the agreement of a six-judge plurality that the panel's decision should be reviewed, the full court declined to rehear

the case. Congressman Sundquist is presently seeking a review of the matter by the Supreme Court.

Our resolution simply requests the Supreme Court to review the case. Adoption of the resolution will not ask the Court to rule in any particular fashion on the merits of Congressman Sundquist's argument but will highlight for the Court the extreme importance of this question to all Members of the House. Every one of us is called upon on a daily basis to perform many official functions which are not integral parts of the legislative process. The job of a Congressman extends far beyond the confines of formulating, debating and acting on legislative proposals. Each of us is in daily contact with Executive agencies and with our constituents. Part of our task is to bridge the gap between the federal government and the citizens we represent. It is important that we be able to attend to these responsibilities without unnecessary fear or inconvenience from litigation. The same reasoning that has led the Judicial Branch to provide a degree of protection to Executive and Judicial Branch officials ranging from cabinet officers to local dog catchers should lead the Court to review a decision denying that protection to Members of Congress.

We hope you will support our privileged resolution.

THOMAS S. FOLEY,
*Majority Leader.*
ROBERT H. MICHEL,
*Republican Leader.*

Mr. FOLEY. Mr. Speaker, I yield to the gentleman from Connecticut [Mr. GEJDENSON].

(Mr. GEJDENSON asked and was given permission to revise and extend his remarks.)

Mr. GEJDENSON. Mr. Speaker, I join with my colleagues in support of this resolution. It is clear that among our primary responsibilities is being advocates for our constituents within the bureaucracy and challenges that they face. Half of our work at times may be the work of serving our constituents.

When you take a look at the volume of our work of the Congress as a whole, some estimate beyond a million cases a year, that is what restores the faith of people in the governmental process who have been trampled by the bureaucracy or larger corporations. Often our role as advocates may be as important as our role as legislators in seeing that this Government serves its people.

I applaud the efforts of the gentleman from Washington [Mr. FOLEY], the majority leader, and the gentleman from Illinois [Mr. MICHEL], the minority leader, on this particular resolution. I urge all of my colleagues to support it.

Mr. Speaker, I rise in support of the resolution asking the Supreme Court to consider the Sundquist case. I am particularly concerned about the impact that case may have on the ability of Representatives and Senators to help their constituents who have trouble with Federal agencies.

While we do not have precise figures, it is a fair estimate that Congress handles over a million constituent cases a year. These include helping constituents on matters of social security, tax, veteran's benefits, immigration, Medicare and Medicaid, and the whole array of problems with the Federal Government.

The help we give constituents is a vital part of their lives, and a major part of our responsibility in holding office. Yet, the Sundquist decision says that when we help on constituent case matters, we are mere volunteers. That decision says that we lack the immunity protection against litigation that every other Federal officer has.

This means that if anyone involved in a constituent case becomes dissatisfied or angry, they can sue us under some negligence theory or other theory, and we will not have any official protection. It involves the courts deeply in the relationship of constituents and their representatives. Quite clearly, the decision puts in doubt our ability to perform casework any more.

An obstacle to our performing casework imperils one of the Congress' most useful public functions. The Supreme Court should take this case, to decide whether the lower court's doctrine squares with the important role casework plays in making the Federal Government responsible to the people.

Mr. MICHEL. Mr. Speaker, I yield 4 minutes to the gentleman from Illinois [Mr. HYDE].

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE. Mr. Speaker, I strongly support this bipartisan resolution to request that the Supreme Court grant the writ of certiorari and review the case in which a lower court held that our colleague, Congressman DON SUNDQUIST, would not receive official immunity for addressing the Attorney General on a public issue, or even for communicating with his constituents on that issue.

Two centuries ago, Thomas Jefferson and James Madison expressed the vital part played in the separation of powers by Members' speech in their "Protest against interference of Judiciary between Representative and Constituent," reprinted in volume 8 of the collected "Works of Thomas Jefferson." Jefferson and Madison's attention was attracted, and their indignation aroused, by a threat to the Representative from their own Virginia district, Samuel Jordan Cabell.

Congressman Cabell had sent his constituents a "circular letter," what we would today call a newsletter—only in those days it was circulated from constituent to constituent as a treasured item, a kinder fate than some of ours meet, I fear. Like any typical opposition newsletter, it blamed the administration for all problems in foreign affairs, particularly, at that time, the conduct of President John Adams' administration with respect to the war in France following the French Revolution.

In response, a grand jury was convened to inquire into the "unfounded calumnies" contained in the circular letter, and whether to charge the Congressman with

criminal defamation. In their "Protest," Jefferson and Madison defended the Congressman saying that "the people have professed the right to being governed by laws to which they have consented by representatives chosen by themselves immediately" and therefore:

> * * * in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, [and] full. * * *

Jefferson and Madison went on to warn of what the effect would be if the Federal judiciary took over this area, in words that we might use today, if we had the deeper understanding of the Constitution they possessed—

> [F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other * * * is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be * * *; is to do away with the influence of the people over the proceedings of their representatives by excluding [them] from knowledge. * * *

Mr. Speaker, I know of few observations so prophetic as Jefferson's, when he says that constituent newsletters are "the substance of representation" and all the rest merely "the shadow." I know that I do not relish being fitted for a judicial muzzle. I find myself in firm agreement with our former colleague, Abner Mikva, who was the vigorously dissenting judge in Congressman SUNDQUIST's case. In this case, his dissent has truly said to those of us on

opposite sides of the aisle, that while we may disagree with each other about what we say, we must defend each other's right to say it. As Judge Mikva warned, without judicial protection for communication with constituents, "we are liable to have a Congress that is deterred from the vigorous exercise of its constitutional responsibilities."

And so, on the eve of the bicentennial year of the Constitution's ratification, I can think of no case more worthy than this of the granting of the writ of certiorari by the Supreme Court. I urge adoption of a resolution to recommend this course to the Supreme Court.

Mr. FOLEY. Mr. Speaker, I yield 2 minutes to the gentleman from Tennessee [Mr. FORD].

(Mr. FORD of Tennessee asked and was given permission to revise and extend his remarks.)

Mr. FORD of Tennessee. Mr. Speaker, I rise in strong support of the resolution urging the Supreme Court to review and overturn the court of appeals decision in Chastain versus Sunquist.

The libel suit against our colleague grew out of a political dispute in Memphis over the propriety of certain techniques for enforcing child support laws and over the proper allocation of the resources of the Legal Services Corporation. In the past, Mr. SUNDQUIST and I have been on opposite sides of the fence with regard to various political disputes. It is quite possible that we will continue to disagree about many subjects.

There is no disagreement between us, however, about the court of appeal's decision or about the lawsuit. The court's decision is very wrong, and this libel suit should be dismissed. Decisions such as this threaten to muzzle the Members of this body and choke off our free and open communications with our constituents.

Mr. Speaker, as many in this body are aware, I myself was recently the victim of an unconstitutional attempt to silence me and prevent me from fulfilling my obligation to communicate with and inform my constituents. A dis-

trict court in my home State of Tennessee issued a gag order that prevented me from discussing or refuting charges made against me.

Fortunately, the Sixth Circuit Court of Appeals recognized how fundamentally improper it was to interfere with the communications between a Representative and the people he represents. The sixth circuit relied extensively on the works of Thomas Jefferson and James Madison. It quoted their comment that communications with constituents "should of right, as of duty also, be free, full, and unawed by any." The sixth circuit understood that a "Representative's legislative role is not limited to formal speech and debate in Congress but includes communication with the electorate." By ignoring these crucial points, the D.C. Circuit has opened the door to an avalanche of harassing and vexatious litigation. The Supreme Court should review this harmful decision and reverse it.

Mr. LOTT. Mr. Speaker, I yield 2 minutes to the gentleman from Wyoming [Mr. CHENEY].

Mr. CHENEY. Mr. Speaker, I thank the gentleman for yielding me this time.

Mr. Speaker, I wish to express my alarm concerning the recent decision against Representative DON SUNDQUIST. The lower court in that case has announced that legislators do not have the official immunity that all other officials have. That case suggests that legislators can be sued for what they say in public and for what they write to executive agency officials.

I want to take a moment to discuss what this decision means, not only to us, but to all legislators. The somewhat twisted logic of the lower court which gave this decision, imperils State legislators quite as much as Members of Congress. That is, if Members of Congress are mere volunteers when they speak out publicly, or write letters to executive agencies, then State legislators are also volunteers when they speak out or write.

Yet, while there are only 535 Members of Congress, there are 50 State legislatures, and thousands of city councils and other local legislative bodies. We are talking about thousands and thousands of State and local legislators. If the Federal courts are going to police what State and local legislators do and say, they will launch a major Federal invasion into how State governments work.

The last thing we need is for the Federal courts, whose dockets are already overloaded, to take on policing the activity and debates of State legislators. I therefore join in supporting the House's request that the Supreme Court take up this case.

Mr. FOLEY. Mr. Speaker, I yield 2 minutes to the gentleman from New York [Mr. SCHUMER].

(Mr. SCHUMER asked and was given permission to revise and extend his remarks.)

Mr. SCHUMER. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, I concur in everything that has been said so far by the gentleman from Washington [Mr. FOLEY] and the gentleman from Illinois [Mr. MICHEL].

Mr. Speaker, the court's decision in the Sundquist cast poses a dangerous threat to one of the most basic of the responsibilities that each of us was elected to carry out.

The framers of our Constitution, in their wisdom, could not have foreseen that this body would be sealed off from communicating with the people whom we represent by a court's decision. Those framers deliberately established a legislature that was to be open and responsible to the people, not a star Chamber in which decisions and the process by which those decisions are reached remain forever mysterious. The Supreme Court should undo the damage.

How empty would the right of the people to petition the Congress be if the Congress and its Members could not communicate back to those who petition. The intrusion by the court of appeals into this fundamental process

of give and take between the Congress and the people must be undone.

Mr. LOTT. Mr. Speaker, I yield 1 minute to the gentleman from Tennessee [Mr. SUNDQUIST].

Mr. SUNDQUIST. Mr. Speaker, I thank the gentleman for yielding me this time.

Mr. Speaker, since I am a direct beneficiary of this legislation, I will refrain from casting a yea or nay vote. I will be voting "present" on this resolution in the event of a recorded vote.

Mr. FOLEY. Mr. Speaker, I yield 2 minutes to the gentleman from West Virginia [Mr. WISE].

Mr. WISE. Mr. Speaker, I appreciate the gentleman from Washington, the majority leader, for yielding me this time.

Mr. Speaker, I too wish to rise in strong support of this resolution.

If Members are sitting in their offices, think about all of the mail that has come in, think about all of the inquiries that have gone out to Federal agencies.

The situation that the gentleman from Tennessee [Mr. SUNDQUIST] is in I find myself in, but perhaps at a little earlier stage. I have not yet been sued, but the implication is clear that I may be because I got involved in a controversy in my district, and because of the request of some constituents I requested a Federal agency to perform an investigation. That is right, to perform an investigation. That was it.

Immediately I get a letter from a law firm with at least five names in the letterhead, that is always a tip off, urging or demanding I retract my statements or the implication is that litigation will follow.

So I say to my colleages somewhere sitting in their offices right now is a letter with those possible implications. That is the significance of this case, and that is why I strongly urge a unanimous vote in favor of this resolution.

Mr. LOTT. Mr. Speaker, I yield 2 minutes to the gentleman from Florida [Mr. MCCOLLUM].

(Mr. McCOLLUM asked and was given permission to revise and extend his remarks.)

Mr. McCOLLUM. Mr. Speaker, I strongly concur in this resolution. I believe the speech and debate clause is extremely important for the Members of this body to conduct their business and for the country to be protected.

But having experienced a good deal of study of this issue during the course of the Iran-Contra hearings, I do want to point up some distinctions involved in this matter. First of all, the letter involving the gentleman from Tennessee [Mr. SUNDQUIST], was something that he wrote to an agency of Government as a part of his official duties. There is no question in my mind, and I do not think in reading the law there should be a question in the court's mind when they finally analyze this, if they take it up, that anything to do with actions on the floor, anything to do with actions in the committees or in an official capacity, such as this letter, should be protected. That is the only way that we can conduct business in a civil society.

On the other hand, there is an area in which things can be protected and should be unprotected that Members of Congress can do in the way of communicating while they are holding office, and to me one of the most egregious things that a Member of this body or any other body can do while he is holding office is to leak highly classified security information to people who do not have any official reason to have that information.

I certainly do not believe that whatever we pass today or whatever the Supreme Court rules on should impinge the opportunity for this body or for future Congresses to restrain Members from that kind of conduct. I do not think it is protected by the speech and debate clause, and my study of the history of the law, and I have conducted quite a bit of study of it, says that is the case.

But I do urge my colleagues to vote unanimously for this resolution. It concerns the official duties of the gentleman from Tennessee [Mr. SUNDQUIST]. If we do not have a ruling on this, there is going to be tremendous impediment to free and open discussion within this Government that we have to have in conducting our affairs.

Mr. HUGHES. Mr. Speaker, I rise in stong support of the resolution.

I am very concerned that the speech and debate clause of the Constitution is being construed more and more narrowly by the courts in a series of decisions, to the point where it has become almost a meaningless vestige of what was intended by the Framers of the Constitution.

The most recent decision in this line is Chastain versus Sundquist, which held, in essence, that a Member of Congress cannot, in good faith, write to the Attorney General of the United States, about suspected improprieties in the conduct of a federally funded program, without making himself potentially liable for defaming the individuals who are involved in that program.

Mr. Speaker, that just doesn't make sense. It is essentially incomprehensible because, in this particular case, plaintiff and defendant alike agree that the Member of Congress was acting within the scope of his official duties when he contacted the Attorney General.

I don't believe election to Congress should be seen as a license to defame.

But, by the same token, the courts must recognize that debate on public issues does not take place in a vacuum. Rather, it is a public process that, almost by definition, includes an active exchange between the news media, the general public, elected and appointed officials, and everyone else who has an interest in the matter.

We, as elected officials, cannot take part in the process if we are exposed to civil liability everytime we tackle a controversial subject that might invite the attention of the news media.

Our citizens do not send us to Congress so that we can engage in esoteric debate in some quiet corner of the Capitol.

They want to know what we're doing.

They want to know how we feel about what's going on in the public arena.

They want us to be active on behalf of the things they feel are important and that includes, at a minimum, working to eliminate waste, fraud, abuse and impropriety in the conduct of Federal programs.

If I am sitting in my office, and a constituent contacts me to let me know of some impropriety in a federally funded program, should I not bring this to the attention of the proper authorities?

Or, if I feel that the abuse is significant enough, do I not have a duty to raise my voice?

And, if the abuse is a true outrage, do I not have a duty to speak out loud enough for all to hear?

Or instead, perhaps I should think about the possibility that I might be sued, if I speak out. Maybe I should consider that, instead of improving public administration, my actions might just result in days of endless depositions, fishing expeditions through my office files, and all sorts of legal expenses and maybe even a judgment for damages.

In fact, maybe I should just forget the whole thing.

But, Mr. Speaker, that is not our role. We must not forget about, or turn our backs, on the things we believe to be wrong.

Indeed, the history of the speech and debate clause has been traced back through our English heritage to at least the year 1689. Legislative immunity has been seen as critical in fighting against British monarchs who used criminal and civil law to attack and intimidate independent-minded legislators. The Framers of the Constitution sought the same protection for us.

In many respects, the history and development of legislative immunity is one and the same with the history and

development of the system of checks and balances we hold dear in this country, and the idea that each branch of Government in this country is coequal.

Exposing legislators to civil liability, for doing things which are unquestionably within the scope of their official duties, is a step backwards. It is dangerous. It will undermine the ability of elected officials to exercise oversight of the conduct of Government projects and programs. It will unquestionably have a chilling effect on the willingness of Senators and Congressmen to take on controversial subjects.

I urge the overwhelming adoption of this resolution, in hopes that the Supreme Court will overturn this ill-considered decision that is so patently contrary to good government, and the separation of powers.

Mr. FOLEY. Mr. Speaker, I have no further requests for time and I reserve the balance of my time.

Mr. LOTT. Mr. Speaker, I am the final speaker on this side, and I yield myself such time as I might consume.

(Mr. LOTT asked and was given permission to revise and extend his remarks.)

Mr. LOTT. Mr. Speaker, I rise in support of the House's request to the Supreme Court to review the Sundquist case. This decision by a divided lower court held Congressmen liable for expressing their views to the press on public issue. It casts a pall over the ability of Members of Congress to take part in public debate.

In this case, Congressman SUNDQUIST commented on the issues of a dispute between Memphis Area Legal Services, and the juvenile court of that area. That is the type of public issue about which Members of Congress routinely comment. The issue in the case is not which side was right or wrong, but whether Congressmen may comment at all on such matters.

As the divided court ruled in the matter, a Congressman has no official immunity for his statements on official matters. Judge Mikva, in his dissent, points out that under that ruling:

> Congressmen cannot also qualify for the immunity that courts have given to postmen. Today's holding not only ignores precedent, but does damage to our governmental structure.

It astonishes me that a Federal court could say that every other official of the Federal Government receives official protection, but Members of Congress do not, when speaking out on public issues within their responsibilities.

I sincerely hope that the Supreme Court will review this case and in its most careful manner will reverse the lower court decision. It does go to the basic fundamentals of our guarantees as Members of Congress, and I do think this is a forerunner of what could be a whole number of this type of lawsuits being brought against Members of Congress to tie us up and to shut us up. If we do not take active part in this appeal before the Supreme Court and get a favorable ruling by the Supreme Court, the door is wide open, and there will be no end to this sort of thing.

It is a very important part of our responsibility as a Member of Congress to be able to speak out on these public issues. I urge the House to give this overwhelming and in fact hopefully a unanimous vote.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. FOLEY. Mr. Speaker, I yield back the balance of my time, and I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER pro tempore (Mr. GORDON). The question is on the resolution.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. FOLEY. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The vote was taken by electronic device, and there were—yeas 413, nays 0, answered "present" 2, not voting 16, as follows:

[Roll No. 128]

## YEAS—413

Ackerman
Akaka
Alexander
Anderson
Andrews
Annunzio
Anthony
Applegate
Archer
Armey
Aspin
Atkins
AuCoin
Badham
Baker
Ballenger
Barnard
Bartlett
Barton
Bateman
Bates
Beilenson
Bennett
Bentley
Bereuter
Berman
Bevill
Bilbray
Bilirakis
Bliley
Boehlert
Boggs
Boland
Bonior
Bonker
Borski
Bosco
Boucher
Boxer
Brennan
Broomfield
Brown (CA)
Brown (CO)
Bruce
Bryant
Buechner
Bunning
Burton
Bustamante
Byron
Callahan
Campbell
Cardin
Carper
Carr
Chandler
Chapman
Chappell
Cheney
Clarke
Clay
Clement
Clinger
Coats
Coble
Coelho
Coleman (MO)
Coleman (TX)
Collins
Combest
Conte
Conyers
Cooper
Coughlin
Courter
Coyne
Craig
Crane
Crockett
Dannemeyer
Darden
Daub
Davis (IL)
Davis (MI)
DeFazio
DeLay
Dellums
Derrick
DeWine
Dickinson
Dicks
Dingell
DioGuardi
Dixon
Donnelly
Dorgan (ND)
Dowdy
Downey
Dreier
Durbin
Dwyer
Dymally
Dyson
Early
Eckart
Edwards (CA)
Edwards (OK)
Emerson
English
Erdreich
Espy
Evans
Fascell
Fawell
Fazio
Feighan
Fields
Fish
Flippo
Florio
Foglietta
Foley
Ford (MI)
Ford (TN)
Frank
Frost
Gallo
Garcia
Gaydos

Gejdenson
Gekas
Gephardt
Gibbons
Gilman
Gingrich
Glickman
Gonzalez
Goodling
Gordon
Gradison
Grandy
Grant
Gray (IL)
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Green
Gregg
Guarini
Gunderson
Hall (OH)
Hall (TX)
Hamilton
Hammerschmidt
Harris
Hastert
Hatcher
Hawkins
Hayes (IL)
Hayes (LA)
Hefley
Hefner
Henry
Herger
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Hiler
Hochbrueckner
Holloway
Hopkins
Horton
Houghton
Hubbard
Huckaby
Hughes
Hunter
Hutto
Hyde
Inhofe
Ireland
Jeffords
Jenkins
Johnson (CT)
Johnson (SD)
Jones (NC)
Jones (TN)
Jontz
Kanjorski
Kaptur
Kasich
Kastenmeier
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Kennelly
Kildee
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Lagomarsino
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Latta
Leach (IA)
Leath (TX)
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Lewis (CA)
Lewis (FL)
Lewis (GA)
Lightfoot
Lipinski
Livingston
Lloyd
Lott
Lowery (CA)
Lowry (WA)
Lujan
Luken, Thomas
Lukens, Donald
Lungren
Mack
MacKay
Madigan
Manton
Markey
Marlenee
Martin (IL)
Martin (NY)
Martinez
Matsui
Mavroules
Mazzoli
McCandless
McCloskey
McCollum
McCrery
McCurdy
McDade
McEwen
McGrath
McHugh
McMillan (NC)
McMillen (MD)
Meyers
Mfume
Michel
Miller (CA)
Miller (OH)
Miller (WA)
Mineta
Moakley
Molinari
Mollohan
Montgomery
Moody
Moorhead
Morella
Morrison (CT)
Morrison (WA)
Mrazek
Murphy
Murtha
Myers

Nagle
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Nowak
Oakar
Oberstar
Obey
Olin
Ortiz
Owens (NY)
Owens (UT)
Oxley
Packard
Panetta
Parris
Pashayan
Patterson
Pease
Pelosi
Penny
Pepper
Perkins
Petri
Pickett
Pickle
Porter
Price
Pursell
Quillen
Rahall
Rangel
Ravenel
Ray
Regula
Rhodes
Richardson
Ridge
Rinaldo
Ritter
Roberts
Robinson
Rodino
Roe
Rogers
Rose
Rostenkowski
Roth
Roukema
Rowland (CT)
Rowland (GA)
Roybal
Russo
Sabo
Saiki
Savage
Sawyer
Saxton
Schaefer
Scheuer
Schneider
Schroeder
Schuette
Schulze
Schumer
Sensenbrenner
Sharp
Shaw
Shays
Shumway
Shuster
Sikorski
Sisisky
Skaggs
Skeen
Skelton
Slattery
Slaughter (NY)
Slaughter (VA)
Smith (FL)
Smith (IA)
Smith (NE)
Smith (NJ)
Smith (TX)
Smith, Denny (OR)
Smith, Robert (NH)
Smith, Robert (OR)
Snowe
Solarz
Solomon
Spratt
St Germain
Staggers
Stallings
Stangeland
Stark
Stenholm
Stokes
Stratton
Studds
Stump
Sweeney
Swift
Swindall
Synar
Tallon
Tauke
Tauzin
Taylor
Thomas (CA)
Thomas (GA)
Torres
Torricelli
Towns
Traficant
Traxler
Udall
Upton
Valentine
Vander Jagt
Vento
Visclosky
Volkmer
Vucanovich
Walgren
Walker
Watkins
Waxman
Weber
Weiss
Weldon
Wheat
Whittaker
Whitten
Williams
Wilson
Wise
Wolf
Wolpe
Wortley
Wyden
Wylie
Yatron
Young (AK)
Young (FL)

NAYS—0

ANSWERED "PRESENT"—2

| | |
|---|---|
| Jacobs | Sundquist |

NOT VOTING—16

| | | |
|---|---|---|
| Biaggi | Flake | Mica |
| Boulter | Frenzel | Nichols |
| Brooks | Gallegly | Spence |
| de la Garza | Hansen | Yates |
| Dornan (CA) | Hoyer | |
| Duncan | Konnyu | |

So the resolution was agreed to.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

○

Supreme Court, U.S.
FILED
MAY 26 1988
ROBERT L. STANOL, JR.
CLERK

No. 87-1756

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE DON SUNDQUIST,
*Petitioner*

v.

WAYNE CHASTAIN,
*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, BONNEVILLE INTERNATIONAL CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL NEWSPAPER ASSOCIATION, PULITZER BROADCASTING COMPANY, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, TIME INC., AND THE WASHINGTON POST

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-1756

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THE HONORABLE DON SUNDQUIST,
*Petitioner*

v.

WAYNE CHASTAIN,
*Respondent*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, BONNEVILLE INTERNATIONAL CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL NEWSPAPER ASSOCIATION, PULITZER BROADCASTING COMPANY, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, TIME INC., AND THE WASHINGTON POST

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### PRELIMINARY STATEMENT

The National Association of Broadcasters, the American Society of Newspaper Editors, Bonneville International Corporation, the Magazine Publishers of America, Inc., the National Newspaper Association, Pulitzer Broad-

casting Company, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, the Society of Professional Jourialists, Sigma Delta Chi, Time Inc., and The Washington Post respectfully request leave to file the attached Brief Amici Curiae.[1] The amici who have joined in this request and in the attached brief include broadcasters, publishers, editors, news directors, journalists, and associations repsenting them. Together they comprise a broad crosssection of the news media in this country. They submit this brief in support of the Petition for Certiorari filed by The Honorable Don Sundquist, member of the House of Representatives of the United States of America.

## INTEREST OF THE AMICI

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcast networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of this society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations in providing an unfettered and effective press in the service of the American people.

Bonneville International Corporation operates two television stations and twelve radio stations located in seven

[1] Written consents to filing of this brief are being filed pursuant to Rule 36.

states. The Bonneville stations feature news reporting at the local, regional, and national levels, and Bonneville maintains a Washington, D.C., news bureau in order to augment its stations' ability to broadcast news items and public affairs information to the public. Bonneville is interested in the instant case, which affects First Amendment rights in this area.

The Magazine Publishers of America, Inc., is a national trade association including in its membership more than 200 magazine publishers who publish approximately 900 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications and publish weekly, biweekly, and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry, and many other interests, avocations, and pastimes of the American people.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885, NNA, with more than 5,000 member newspapers, is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been that political debate in this country be conducted in an open and robust manner. A free flow of information to the public from the government via the press is fundamental to maintaining the health and vigor of such debate. NNA has consistently opposed efforts to reduce that flow, particularly where allegations of government misconduct are involved.

Pulitzer Broadcasting Company, a wholly-owned subsidiary of Pulitzer Publishing Company, is the licensee of seven television broadcast stations, one standard broadcast station, and one FM broadcast station.

The Radio-Television News Directors Association is a professional association of electronic journalists. The As-

sociation has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.6 million.

The Washington Post, a division of The Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C., area (circulation approximately 800,000 weekdays, 1,050,000 Sundays) and maintains a substantial newsgathering organization.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae are concerned that the First Amendment issues implicit in the decision by the Court of Appeals were not sufficiently addressed in that opinion or considered by the court. Amici can offer the Court a perspective on these issues that may not have been highlighted by the litigants.

First, it is clear that the Court of Appeals focused only on the "official immunity" that Representative Sundquist had raised as a defense to plaintiff's defamation claims. The Court of Appeals rejected Sundquist's argument that members of Congress, like members of the executive and judicial branches of government, should enjoy an immunity from liability for all acts performed in the course of their official duties. But in analogizing the "official immunity" Sundquist sought to the "executive immunity" that applies to the executive branch of government, the Court of Appeals rejected too much.

While denying a claim for a blanket tort immunity for members of Congress, the court did not need to reject what was essentially a claim of privilege for speech made by members in the course of their official duties. The special status of speech under the First Amendment and the important role that open discussion and debate play in our system of government suggest that speech by a member of Congress should be carefully distinguished from other acts that might give rise to other forms of tort liability. The decision of the Court of Appeals failed to make this distinction. Amici consider this distinction to be central to any constitutionally sound decision regarding the rights of members of Congress to speak freely about issues of public concern in the course of their official duties.

Amici therefore contend that any decision that limits or inhibits the ability of members of Congress to speak freely on issues of public concern is constitutionally unsound because it impairs significant First Amendment

values. In support of this contention, amici offer the following three-part argument:

A. If members of Congress are forced to assess their risk of liability before they speak openly on issues of public concern, the quality of public debate, in which the press is an important participant, will be impoverished.

B. A qualified privilege would lighten the burden of fear and uncertainty and encourage members of Congress to speak more freely to their constituents and to the press.

C. By recognizing a privilege for members of Congress who speak out on issues of public concern, this Court would strengthen protection for the press to report and comment on those statements.

For these reasons, amici urge this Court to grant Representative Sundquist's petition for *certiorari* and reverse the decision of the Court of Appeals that refused to recognize a privilege for statements made by members of Congress in the course of their official duties but outside their strictly legislative functions. Members of Congress should be free to communicate openly on issues of public concern at anytime and in any place.

## ARGUMENT

### I. If Members of Congress Are Forced to Assess Their Risk of Liability Before They Speak Openly on Issues of Public Concern, the Quality of Public Debate, in Which the Press Is an Important Participant, Will Be Impoverished.

By declining to recognize a privilege for members of Congress to speak openly to their constituents and to the press, the Court of Appeals for the District of Columbia Circuit has jeopardized the marketplace of ideas protected by the First Amendment. When members of Congress are inhibited from communicating openly about issues of public concern, the press will lose one of the most important and newsworthy sources of commentary on is-

sues of the day.[2] The decision of the Court of Appeals will discourage members of Congress from communicating their views to the press as well as to their constituents. This "chilling effect" may affect not only the quality of public debate but also the quality of government itself. As Judge Mikva observed in dissent:

> When a government official lives in fear of litigation stemming from his official acts, he will often fail to execute his office and perform his responsibilities with the vigor and decisiveness required by the public good.

*Chastain v. Sundquist*, 833 F.2d 311, 329 (D.C. Cir. 1987) (Mikva, J., dissenting).

The press often relies on members of Congress and their staffs for insight and commentary on the operation of government. Fear of litigation is likely to reduce the availability of this information and deny the necessary "breathing space" for the free and open discussion of issues of public concern. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964). In such a climate, the prudent member of Congress will become more guarded in what he or she says to his or her constituents, to his or her political adversaries, and to the press. The muffling—even slightly—of this vital source of information deprives the electorate and the press of information about the way government functions and the ways its elected and appointed officials operate. Without this information, the

---

[2] Whenever a member of Congress speaks in the course of his official duties, it is a matter of "public concern." The exchange of communications with his constituents is, for example, not only a useful forum for the exchange of ideas but also a necessary part of representative government. The decision of the Court of Appeals leaves this entire dialogue vulnerable to defamation suits. Furthermore, members of Congress may communicate to others, including the press, concerning matters raised in constituent communications. These communications are equally unprotected under the Court of Appeals decision, though they are clearly a matter of "public concern."

electorate is ill-equipped to develop informed opinions and make informed decisions about its government.

The First Amendment is a powerful guardian not just for the expression of ideas but also for the dissemination of information. *Id.* ("protection of the public requires not merely discussion, but information"). Without information, political debate on public issues cannot be "uninhibited, robust, and wide-open." *Id.* at 270. In a representative government, the people participate in this robust debate, in substantial part, by electing representatives and by engaging in an ongoing dialogue, enriched by the mutual exchange of information, with those elected representatives. As part of this continuing dialogue between the electorate and its elected officials, those officials have a duty to communicate with their constituents. As Woodrow Wilson observed,

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.

W. Wilson, *Congressional Government* 303 (1885).

Congress has itself recognized that representative government is meaningless without full and effective communication with the electorate. For this reason, Congress provides substantial financial support for direct communications between members of Congress and their constituents. This support includes free postage for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the *Congressional Record*. *See Gravel v. United States*, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting). Recognizing the importance of communication with the electorate, both houses of Congress have voted to allow broadcast coverage of debates and committee meetings.

The opportunities for such direct communication, however, are constrained by the practicalities of modern government. Constituents rarely have the opportunity to observe their elected representatives firsthand and may not be able to observe televised debates or hearings. Nor may they have time to digest the mountains of information that emanate from Washington in the form of verbatim reports in the *Congressional Record*. Consequently, Congress often communicates to the public, and the public to Congress, through the press. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting the media's function as a "surrogate" for the public). This Court has recognized the importance of the role of the press in promoting this communication:

> Without the information provided by the press, most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

If one major source of information for this vital channel of communication is inhibited from openly expressing its views, the representative character of our political system is compromised. The Court is presented with an opportunity to ensure that these vital lines of communication between Congress and the electorate remain open and that the press is able to continue its role as a participant in this dialogue. In so doing, the Court will help to ensure that each citizen is able to participate in and contribute to our representative system of self-government. *See Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of . . . the press . . . impairs those opportunities for public education that are essential to . . . the processes of popular government").

Communication between elected officials and the press has a "structural" role to play in securing and fostering American representative democracy. *See Richmond News-*

*papers*, 448 U.S. at 587-88 (Brennan, J., concurring in judgment). For example, when members of Congress share their views on government with the press, they promote accountability in government by exposing government action to public scrutiny.[3] This communication not only promotes public scrutiny of official conduct but also permits the public to make an informed contribution to the ongoing debate concerning allocation of responsibility among the three branches of government. As the Ninth Circuit has observed.

> The public press performs its most valuable function in the interest of the people at large by correctly reporting proceedings which relate to the administration of law. It is vital in a country which relies upon representative officials that the public be so informed. Otherwise, there is no guard against maladministration.

*Borg v. Boas*, 231 F.2d 788, 794 (9th Cir. 1956). Without the press's participation in creating an informed public, governmental officials may escape the critical and constructive scrutiny that is vital to ensure a properly functioning representative government.

By refusing to recognize a privilege for members of Congress to perform this "supervisory" activity,[4] the

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[3] Justice Holmes discussed this scrutinizing function of the press with respect to judicial proceedings:

> [The privilege is justified by] the security which publicity gives for the proper administration of justice . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

*Cowley v. Pulsifer*, 137 Mass. 392 (1884).

[4] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring in judgment); *see also* Note, *Privi-*

Court of Appeals has sent a signal to members of Congress that commentary and criticism of government, government agencies, and government officials made outside the floor of Congress is not one of their "official duties." In so doing, the Court of Appeals has failed to acknowledge this Court's observation that a legislator's duty to inform the public about matters affecting the administration of government is one of the things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *see also Watkins v. United States*, 354 U.S. 178, 198 (1957); *Gravel*, 408 U.S. at 625.

These conflicting signals can contribute only confusion and uncertainty and will encourage members of Congress to follow the safe route of silence rather than risk exposing themselves to defamation suits. By granting *certiorari*, the Court could eliminate this uncertainty and encourage members of Congress now at risk to speak out on important issues, even when they are not on the floor of Congress. That these 'informing" and "supervising" functions of Congress are not strictly legislative in nature should not prevent members of Congress from performing them without fear of liability. As Judge Mikva observed,

> These tasks are entitled to—but more important, these tasks *need*—no less protection than the tasks performed by the vast majority of other governmental officials in the exercise of their authority.

*Chastain*, 833 F.2d at 332 (Mikva, J., dissenting).

Without protection for these important tasks, members of Congress will be discouraged from communicating.

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*lege to Republish Defamation*, 64 Colum. L. Rev. 1102 (1964) (analysis of "supervisory," "informational," and "agency" rationales); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. Rev. 469 (1979) (discussion of "supervision," "information," and "agency" theories).

This Court should take this opportunity to encourage, not to discourage, those best suited and best placed to make a meaningful contribution to the discussion of issues of public concern.

**II. A Qualified Privilege Would Lighten the Burden of Fear and Uncertainty and Encourage Members of Congress to Speak More Freely to Their Constituents and to the Press.**

The Court of Appeals failed to recognize any kind of privilege for remarks that members of Congress make while carrying out their official duties. This case presents the Court with an opportunity to establish a standard of proof that will allow members of Congress who speak out on public issues a measure of comfort as to their exposure to liability for defamation.

The Court of Appeals decision, if allowed to stand, leaves members of Congress exposed to liability on a mere showing of negligence for comments made while carrying out their official duties. In *Sullivan* and *Gertz* this Court struck a balance between the First Amendment interest in encouraging "uninhibited, robust and wide-open" debate on public issues, *Sullivan*, 376 U.S. at 270, and the government's interest in securing compensation for "individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-84 (1979).

A qualified privilege tempered by an "actual malice" standard would at least reduce the uncertainty that inhibits members of Congress from speaking openly about public issues, whether those issues concern "private" or "public" figures. Moreover, members of Congress cannot be expected to anticipate whether the potential defamation plaintiffs who may take offense at their words are private or public figures. The fact that the member's comments may concern private or public figures has no bearing on the newsworthiness of those comments or their contribution to the public debate. "Here the speech

concerns the legitimacy of the political process, and therefore clearly 'matters.'" *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (quoting *Gertz*, 418 U.S. at 341 (First Amendment "protect[s] speech that matters")).

This Court has recognized that "newspaper reports of public meetings of the citizens of a community concerned about matters of local governmental interest and importance" deserve First Amendment protection. *Greenbelt Cooperative Publishing Association v. Bresler*, 380 U.S. 6, 13 (1970). Just as news reports of these meetings are vital to free political discussion, without regard to the status of the participants as private or public figures, so too is the willingness of governmental officials to participate in this kind of dialogue. Only by recognizing a privilege can this Court ensure that "*all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" will be discussed by Congress and reported by the press. *See Thornhill*, 310 U.S. at 102 (emphasis added).

### III. By Recognizing a Privilege for Members of Congress Who Speak Out on Issues of Public Concern, This Court Would Strengthen Protection for the Press to Report and Comment on Those Statements.

The common law "record privilege" permits the press to republish remarks made by an official in an "official governmental proceeding." *Restatement (Second) of Torts* § 611, comment d (1977). Several state courts have extended this privilege to cover remarks that an official makes in the scope of his or her official duties, though not in an "official governmental proceeding." *See, e.g., Kilgore v. Younger*, 102 Cal. App. 3d 744, 162 Cal. Rptr. 469 (1980); *Short v. News Journal Co.*, 58 Del. 592, 212 A.2d 718, 721-22 (Del. 1965); *see also, Foster v. Turner Broadcasting System, Inc.*, 1988 Westlaw 32881 (2d Cir. Apr. 13, 1988). By recognizing a privilege for members of Congress for the remarks they make in the course of their

official duties, this Court would recognize, strengthen, and clarify the privilege of the press to republish these remarks and thereby enrich public debate on issues of public concern.

The Speech and Debate Clause grants members of Congress immunity for statements they make in official legislative proceedings. U.S. Const. art. I, § 6, cl. 1; *Hutchinson*, 443 U.S. at 113. The "record privilege" gives the press a corresponding privilege to report those statements, provided it does so in a fair and true report. *See, e.g., Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y.2d 63, 424 N.Y.S.2d 165, 399 N.E.2d 1185 (1979) (recognizing privilege for fair and true account of congressional committee's report). The press's "record privilege" is analogous to the privilege members of Congress enjoy by virtue of the Speech and Debate clause.

If this Court were to affirm a broad scope for the privilege protecting members of Congress, the analogous privilege for the press to report and comment on those remarks would be strengthened. Conversely, the risk to the press in reporting and commenting on statements made by members of Congress would be reduced.[5] This petition, therefore, presents this Court with an opportunity to affirm and protect the flow of information to the public through the press, both directly and indirectly. Directly, recognition of a privilege would encourage members of Congress to speak openly to the press. Indirectly, a privilege for members of Congress would

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[5] If the Court recognizes a privilege for Congress, a member would enjoy a privilege for his speech and would bear no risk of liability for his words. In states that do not yet recognize this privilege, the press, on the other hand, would not be protected by even a qualified privilege to republish those words. This would lead to the illogical result that in a defamation suit against both the legislator and the republisher, the press alone would bear exposure to liability.

strengthen the qualified privilege of the press to make fair and accurate reports of statements made by those members within the scope of their official duties.

## CONCLUSION

For these reasons, amici urge this Court to grant Representative Sundquist's petition for *certiorari* and reverse the decision of the Court of Appeals that refused to recognize a privilege for statements made by members of Congress in the course of their official duties but outside the floor of Congress. Members of Congress should be free to speak openly on issues of public concern at any time and in any place.

Respectfully submitted this 24th day of May, 1988.

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No. 87-1756

In The
# Supreme Court of the United States
October Term, 1987

DON SUNDQUIST,

*Petitioner,*

v.

WAYNE CHASTAIN,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 6, 1988

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## QUESTION PRESENTED

Whether Petitioner, a Member of Congress, is immune from common law actions seeking money damages for defamation under the doctrine of official immunity where the actions taken by Petitioner were outside of his legislative responsibilities.

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No. 87-1756

In The
# Supreme Court of the United States
October Term, 1987

DON SUNDQUIST,

*Petitioner,*

v.

WAYNE CHASTAIN,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 833 F.2d. 311. The opinion of the District Court from which Petitioner's appeal flows is found at Petitioner's Appendix B and is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1987. A Suggestion for a Petition for Rehearing *en banc* was denied by the Court of Appeals on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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## STATEMENT

1. Respondent, Wayne Chastain, is a staff attorney employed by the Memphis Area Legal Services (MALS), which provides legal services to indigents in southwest Tennessee and is funded by the Legal Services Corporation. Petitioner, Don Sundquist, is a Member of Congress representing the 7th District of Tennessee. In contrast to the largely black, intercity clientele of MALS, Mr. Sundquist's suburban constituency in the Memphis suburbs is predominantly white and largely affluent. *Almanac of American Politics, 1986,* Barone and Ujifusa.

Since 1978, Respondent, as a MALS staff attorney, has fought a protracted legal battle with the Juvenile Court of Memphis and Shelby County and its elected chief judge, Kenneth Turner. This dispute revolves around the court's unjust collection of child support payments from indigent Memphis residents, often involving contempt proceedings and the imposition of jail sentences without affording indigents their constitutional rights to due process and assistance of counsel. Through civil actions pursued by Respondent in the federal courts, many of these rights

have now been secured. See *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

On January 14, 1985, Petitioner, a close friend of Judge Turner, together with one of Judge Turner's court referees, State Senator Curtis Person, wrote a letter on his Congressional letterhead to then Attorney General William French Smith. See Petitioner's Appendix E. Subsequently, a copy of this letter was released to the Memphis media.

In his letter, Petitioner accused MALS of being involved "in the obstruction of the administration of the Child Support Enforcement laws" due no doubt in part to the recent legal victories obtained by Respondent. Petitioner continued by making a series of false allegations about Respondent, including a claim that he had been hired by MALS solely to harass Judge Turner, that Respondent worked in concert with two convicted felons and that Respondent was responsible for organizing street demonstrations against the Juvenile Court. Following release of the letter to the media, Petitioner further defamed Respondent at a civic luncheon in Memphis.

Following Petitioner's letter to the Attorney General, on February 27, 1985, Stephen S. Trott, then Assistant Attorney General, wrote to Respondent that he had reviewed Petitioner's allegations and concluded "that there is not sufficient evidence that federal criminal laws were violated to justify a federal investigation".

Respondent then sought, on two occasions, a retraction from the Petitioner. Failing that, on December 9, 1985, Respondent filed his Complaint in the Superior Court of the District of Columbia. (Petitioner's Appendix

D) Shortly thereafter, Petitioner removed the case to the United States District Court for the District of Columbia.

On April 9, 1986, the District Court, following briefing and oral argument, dismissed Respondent's Complaint, concluding that Petitioner was immune from suit under the doctrine of official immunity as enunciated by this Court in *Barr v. Mateo,* 360 U.S. 564 (1959). Respondent appealed.

Nineteen months later, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, in a well reasoned opinion consistent with the precedents of this Court, reversed and remanded the District Court ruling below.

Circuit Judge Buckley, writing for the majority, found, based principally upon two prior decisions of this Court, *Doe v. McMillan,* 412 U.S. 306 (1973) and *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), that there is no special immunity available to Members of Congress for suits in the nature of defamation other than the protection afforded by the Speech or Debate Clause. U.S. Const. art. 1, sec. 6, cl. 1.

The majority found this holding consistent with both historical and contemporary considerations of policy which have uniformly supported the theory of legislative exposure for common law defamation. The rationale for executive branch immunity rooted in *Barr* does not and should not apply to legislators, whose function is to make the laws, not enforce them, since no authority forces them to act. To the extent that Congress needs a measure of immunity, it was incorporated by the founding fathers

into the Constitution by virtue of the Speech or Debate Clause.

In conclusion, the majority found that:

> The Speech or Debate Clause provides members of Congress with an immunity that is coextensive with their legislative responsibilities. When they move beyond the requirements of their legislative responsibilities, they do so as volunteers, and at their own risk, however important their myriad activities may be in the texture of contemporary political life.

Judge Mikva dissented, finding that the actions of Petitioner fell within his official duties as a Member of Congress and, as such, should be immune so as to allow him to avoid the cost and inconvenience of defending against suits such as the one brought by Petitioner. However, as the majority most forcefully pointed out,

> public accountability is an essential feature of good government . . . the dissent would add a novel judicial protection without any evidence of its need, and do so at the risk of undermining the "good government" it so earnestly seeks. (Petitioner's Appendix at 29a-30a)

Following the panel decision, Petitioner filed a Suggestion for Rehearing *en banc* which was denied on January 27, 1988.

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## ARGUMENT

The decision of the court of appeals below is consistent with the decisions of this Court, other circuit courts of appeals and with other decisions within the District of Columbia Circuit.

1. The decision below has not created, as Petitioner contends, a constitutional crisis between what it terms the "political" (legislative) and the "life tenured" (judicial) branches of government.[1]

Any conflict arising by virtue of the majority opinion is not between these two coordinate branches of government, but between Congress, which seeks authority to speak carelessly and with impunity, and its constituency, the people, who seek some measure of accountability and a check upon unprincipled legislators who would cause great harm to their names and their reputations without feeling the need to be truthful in their remarks.

Any suggestion that a "vital pillar" of the separation of powers will stand or fall based upon the decision below or that the legislative branch will be unable—or afraid—to govern is, quite frankly, ludicrous. To the contrary, one would have expected such a result, or more so, following this Court's decision in *Hutchinson v. Proxmire,* 443 U.S. 111 (1959), where Speech or Debate Clause protection for defamation actions was erased.[2]

2. While it is well established that official immunity, in one form or another, is generally available to executive branch officials, *Barr v. Mateo,* 360 U.S. 564 (1979) and has been held applicable in theory to legislative branch of-

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[1] If anything, Petitioner has created a separation of powers problem by his decision to point up House Resolution 446 and its concomitant "parade of horribles" in a Supplemental Brief which is clearly an attempt by the legislative branch to impose its will upon the judiciary.

[2] Petitioner makes much of the threat of impending litigation, yet offers no evidence that any such threat has or would materialize.

ficials, *Doe v. McMillan,* 412 U.S. 306 (1973), in no instance has this Court nor has any other court reported that the official immunity doctrine protects Members of Congress from common law defamation actions. To the contrary, this Court has, on two separate occasions, held just the opposite.

In *Doe,* supra, this Court stated, in an action brought against Members of Congress, their staffs, the Public Printer and the Superintendent of Documents, that:

> We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors . . . The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, *and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of ligitimate legislative activity" . . ., *they enjoy no special immunity* from local laws protecting the good name or the reputation of the ordinary citizen. (at 324) (emphasis added)

Read plainly, Petitioner is not entitled to relief under any theory of immunity, Constitutionally mandated or otherwise. The Court's holding in *Doe* was affirmed in *Hutchinson,* supra, where, quoting the prior decision, it was noted:

> A Member of Congress may not with impunity publish or libel from the speaker's stand in his home district . . . (at 130)

Respondent can reach no conclusion, other than that reached by the majority below, that Members of Congress are not immune from defamation actions.[3]

To reverse the majority below would completely undermine the rationale behind this Court's hold in *Hutchinson*, supra, which precluded any attempt to grant Congressmen a license to libel.

3. Any potential inconsistency created by denying official immunity to Members of Congress in defamation actions is resolved by either of two theories.

The first, and most logical, is that this Court has interpreted historical and public policy considerations as barring blanket protection from defamation actions. As the majority below points out,

> the historical record reveals an explicit, previously unquestioned rule of liability for a legislator's published libel on one hand, and immunity for executive officials . . . The accumulated wisdom accounting for this differentiation counsels against the grant of immunity sought by appellee. (Petitioner's Appendix at 22a).

Second, the founding fathers apparently recognized that some level of immunity for legislative actions was necessary to our governmental framework and they incorporated it into the Constitution. Executive immunity has developed along a separate track, and the two have crossed only rarely. To the extent immunity is available

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[3] Respondent recognizes that the Court's holding in *Hutchinson* was based solely upon the conclusion that the Speech or Debate Clause did not bar recovery. Nonetheless, Respondent concurs with the majority that there is no "blanket protection for libel suits". (Petitioner's Appendix at 13a)

for defamation, historically it was considered fair that legislative acts be protected by the Speech or Debate clause, or not at all.

4. As the majority below pointed out, the rationale for *Barr,* does not extend to legislators. Unlike the executive branch official who is obligated to enforce the laws enacted by Congress and to exercise enforcement discretion, the legislator has complete freedom in declaring the laws of our nation and control over their actions. The executive, on the other hand, lacks such control, and therefore the judicial doctrine of official immunity was developed.[4]

5. Petitioner argues the need to protect a Member's communication with his constituents as "one of our democracy's main channels of popular *accountability* and *responsiveness*" (Petitioner's Brief, at 13). (emphasis added). By the same token, a Member must act responsibly in making such communications and, just as he seeks to hold his constituent accountable, the constituent must be able to likewise hold the Member accountable.

One cannot imagine this concept being more important than at the height of a political contest, where spirits run high, tempers run short and where there is the tendency for candidates to make statements which "excite political passions." (Petitioner's Brief at 12) At the same time, there is often a tendency to ignore the accuracy of the

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[4] Petitioner urges the Court to adopt the "functional" test utilized in *Forrester v. White,* 484 U.S. — (1988) and find that the informing function of Congress requires a grant of official immunity. To the contrary, it is the abuse of that process, often in a purely political context, which is at issue here and for which no immunity should be allowed.

statements which are made, or to make them without proper investigation. By granting what Petitioner seeks, challengers for federal legislative office are placed at a distinct disadvantage since incumbents would be granted *carte blanche* to speak their mind without fear of being held accountable.

6. Contrary to Petitioner's claim that the decision below has turned Members into a cadre of "walking deep pockets" (Petitioner's Brief at 15), the real effect of the decision is that it puts them on an even par with everyone else, at least as to defamation. This result is not dissimilar from that reached recently in *United States v. Ford,* 830 F.2d 596 (6th Cir. 1987), where the panel reversed a "gag order" imposed by the District Court upon a Member under criminal indictment, concluding that "the representative be *as free* as his constituents" (at 601) (emphasis added) to speak his mind on issues of importance to him and to his freedom. By the same token, however, is the undeniable notion, supported by this Court's prior decisions in *Hutchinson,* supra and *Doe,* supra that a representative is not any freer than those that he represents. Petitioner should get no more and no less.

Nonetheless, *Ford* is clearly distinguishable from the instant case, except for the limited purpose alluded to above, since *Ford* involved a flagrant attempt by the judicial branch, through a *sua sponte* gag order, to stifle political communication while Respondent is merely seeking to pursue a civil remedy for damages already incurred.

Other cases cited by Petitioner, including, among others, *Hartley v. Fine,* 780 F.2d 1383 (8th Cir. 1985); *Morrison v. Jones,* 607 F.2d 1269 (9th Cir. 1979); *Kuzinich*

*v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982) and *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986) are completely inapposite either because 1) they involve state or local legislators who do not already enjoy the benefits bestowed by the Speech or Debate Clause or 2) they do not involve issues of alleged defamation, which has obviously been the subject of separate consideration by this Court.

7. Finally, Petitioner complains of the "great menace inherent in inviting litigation against Members" and the " 'social costs' of such suits" (Petitioner's Brief at 15-16) and suggests that it is ample foundation to require immunity for Petitioner. While Respondent concedes in theory the propriety of this rationale as it extends to executive branch officials who, day in and day out, must enforce the laws enacted by Congress with often unpleasant consequences, no such heavy burden rests on Petitioner's shoulders. He has the freedom to act or not act as he so chooses.

At the other end of the scale is the potential menace and social costs inherent in giving a legislator too much freedom to speak his mind. As the majority below commented (Petitioner's Appendix at 27a):

> Among the many problems with this position is that of distinguishing between congressional activity undertaken to further a constituent's interests and that undertaken to further the member's interest in reelection. The line between the two can be as fine as the line that separates privilege and license; and it takes little imagination to see the ease with which, in the heat of political contest, an immunity from suit for common law libel becomes a license to libel.

This, rather than the arguments advanced by Petitioner, is the heart of the case presented herein to the Court.

———o———

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 6, 1988